

2-1-1972

The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making

Elaine A. Alexander

Lawrence A. Alexander

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law Commons](#)

Recommended Citation

Elaine A. Alexander & Lawrence A. Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190 (1972).

Available at: <https://digital.sandiego.edu/sdlr/vol9/iss2/3>

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making

ELAINE A. ALEXANDER*
LAWRENCE A. ALEXANDER**

"A man ain't nuthin' but a man"
"John Henry"

INTRODUCTION

This article is written in response to various proposals and policies developed in recent years for implementing this society's responsibility toward members of minority and underprivileged groups. Although broad in scope and applicability, the analysis and criticisms focus principally on those programs structured around racial and ethnic criteria. An example of such programs is the use by educational institutions, employers, unions, and other organizations of preferential admissions or hiring standards for applicants of certain racial or ethnic groups, or—a variation upon that theme—a minimum quota for members of those groups. Other examples include legally compelled integration (also a quota system, to be distin-

* B.A. 1965, Washington University; LL.B. 1968, Yale Univ.; Deputy Attorney General, State of California.

** B.A., 1965, Williams College; LL.B. 1968, Yale Univ.; Ass't Prof., Univ. of San Diego School of Law.

guished from the legal prohibition of compulsory segregation and discrimination) and the offer of assistance, such as grants, loans, tax benefits, and other resources, to individuals and communities because of their racial or ethnic characteristics.

It is important to stress, first, that the justification for—or lack of objectionability to—programs organized around racial and ethnic principles is not at all self-evident. One does not have to look into the far-distant past to recall a time when the idea of discriminating in favor of (or against) persons because of their race or ethnic group, or, for that matter, because of their religion, nationality, sex, or other group connections, would have been repugnant to many of the individuals and institutions now considering or engaging in such practices. Discrimination of this type was regarded as *prima facie* unfair, at least, if not unfair *per se*; and so strongly was it believed that the essence of fairness consisted in the total disregard of any such characteristics that many institutions removed all references to them in application forms and even ceased requiring applicants' photographs in order to preclude consideration of them.

One reason for the abhorrence felt toward discrimination was the belief—born from an uneasy proximity to the days of Jim Crow, the days of the Jewish quota, and the days when many of the finest, most prestigious, and most powerful organizations were inbred clubs of good WASP families—that we can make just, humane, and democratic allocations of rights and privileges only by judging men as individuals and not as part of a group, unless group membership reflects something about the *individual* relevant to the purpose of the decision. It was believed that race or ancestry, although significant as a physical fact to geneticists, physiologists, and anthropologists and as a social phenomenon to sociologists, historians, and political scientists, is an absurd ground for a judgment of right or privilege, including a judgment of who is entitled to attend a given school, hold a given job, join a given union, live in a given housing project, obtain a loan, or receive other benefits. In fact, if there was one parameter which above all others was viewed as the best measure of the extent and growth of the democracy and justice of a society or its institutions, it was the degree to which ancestry, along with religion, nationality, and sex, was deemed irrelevant to the making of such judgments.

Another reason for the almost uniform rejection of racial and eth-

nic criteria was the understanding that *inclusion* on the basis of these criteria necessarily entails *exclusion* on the same basis. One cannot discriminate in favor of "blacks" without discriminating against "whites" and other "nonblacks"—and vice versa. The practice of "benign" discrimination, therefore, was rejected as an ethical wrong premised upon a logical contradiction.

The same objections once raised against racial and ethnic discrimination remain today, thus precluding any claim that the justifiability and fairness of the programs in question are self-evident. Because there is, indeed, an apparent injustice in using racial or ethnic criteria (or almost all "group" criteria) in the making of most decisions regarding the distribution of benefits and burdens, the individuals, organizations, and officials involved in such programs have a moral and social obligation to offer arguments for them which can withstand these and other objections. This article will, after exploring the general relationship between justice and the use of group criteria, examine and criticize the principal arguments most frequently advanced by proponents of such programs—arguments which, it is believed, prove ultimately to be unsatisfactory.

I. JUSTICE AND GROUP CRITERIA IN DECISION-MAKING

A simple statement of what justice requires with respect to the use of group criteria may be formulated in the following manner: it is unfair in all cases to allocate burdens and benefits to persons on the basis, in whole or in part, of race or membership in any other group where such membership has no rational connection with the purpose of the allocation.¹

1. It will be assumed throughout this article that what is meant by the "purpose" of an allocation of benefits or a restriction of freedom (see note 7, *infra*.) is unambiguous. In reality the purposes behind many decisions affecting benefits and liberties are quite complex. For example, is the purpose in hiring an airline stewardess to find someone who can serve food and drinks and give information to passengers, or is the purpose as well to find someone who pleases the majority of passengers by her attractiveness? Whatever the purpose is will determine whether discrimination on the basis of membership in, for example, a sexual group or a hair-color or eye-color group is rationally connected with the purpose of the allocation of the job benefit. In this article the "purpose" of a decision will generally be synonymous with the "legitimate purpose" of a decision unless the legitimacy of a particular purpose is itself under consideration. "Legitimate purposes," moreover, will exclude purposes giving effect to the *personal taste in people* of the decision-maker or of those for whom the decision is made (e.g., the decision-maker's employees, clients, etc.). Thus, the fact that an employer likes Italians or dislikes redheads will not make his hiring policies giving effect to these tastes in people legitimate. However, at a certain point, the location of which is quite debatable and

Although this requirement will be considered from several perspectives, let us, initially, examine some concrete illustrations of its operation.

Suppose, for example, that loans designed to help poor persons are given instead to "black" (or "white") persons as a group. Then non-poor "blacks" (or "whites") will be included while poor "nonblacks" (or "nonwhites") will be excluded. Or suppose that the same poverty loans are apportioned among all ethnic groups so that each group receives an amount or quota determined by its relative size. Then the poor of those groups which have the fewest poor will benefit more than the poor of those groups with the most poor. Distribution of the loans on a group basis, therefore—either to one group alone or among groups on a quota basis—will allocate unequal benefits to individuals who deserve, by rational criteria (as determined by the purpose of the allocation: the alleviation of poverty), the same benefits. In this sense the allocation is unjust.

Consider another set of examples of the injustice of using ancestral or other group criteria in decision-making. Assume that, of the eighteen most talented baseball players in a given league, fifty per cent are "black" and fifty per cent are "white." If, in naming an eighteen-man All Star squad, we choose the eighteen most talented "*black*" players in the league, rather than the eighteen *most talented* players, then half the players selected will be less talented than some players who are not selected. If the criterion for *deserving* to be chosen is talent, the latter could legitimately claim injustice. Suppose, on the other hand, that we pick this same league's All Star squad so that its racial composition will, as accurately as

the justification of which has been left unexplored philosophically, personal tastes in people do become legitimate bases for decisions, such as in choosing one's friends or spouse or in favoring one's relatives. Moreover, even certain decisions (such as hiring someone for a job) which cannot generally be legitimately based upon tastes in people can be based upon tastes in certain aspects of people, such as whether they are neat and clean, have pleasant personalities, etc. The decisions which will be the primary focus of this article will be those which fall clearly in the area where personal taste in people has been thought by most of society to be an illegitimate basis of decision; and the criteria used by decision-makers which will be discussed herein will not be criteria such as neatness, cleanliness, or personality. The authors, however, hope that other articles will analyze the relation of personal tastes to personal tastes in people, the relation of taste in people to the concept of prejudice, and the relation of all of the above to justice.

possible, reflect the racial composition of the league as a whole (let us say, approximately eight "whites" to one "black"); we decide, in other words, to "integrate"² our team by the use of racial quotas. Under this selection standard seven less talented "whites" will take the place of more talented "blacks." The excluded group, once again, could legitimately claim injustice.

Of course, there is a third method of using group criteria in making these types of decisions: we could select for each group a quota reflecting the percentage of individuals within it who meet the objective qualifications, *e.g.*, who are impoverished or who are good at baseball. But this is an artificial and roundabout way of achieving the same result that would be reached by abandoning group quotas altogether and using individualized standards in the first place.

The choice between taking ancestral or other group criteria into account and not doing so is a choice at best between group equality of treatment and individual equality of treatment. Thus, in the example about the baseball team, proportional equality between "black" and "white" groups would dictate giving two positions on the squad to "black" men and the remaining sixteen to "white" men, whereas using only criteria relevant to the purpose of choosing All Star baseball players, *i.e.*, superiority of talent, would dictate giving nine positions to "black" men. The seven "black" men excluded under the group equality judgment would be entitled to claim unjust treatment in that they lost their positions to less talented "white" men solely because of their race. Although "blacks" could claim equal treatment as a *group* if the group equality (quota) standard were used, *individual* "blacks" would not receive treatment equal to individual "whites," since the latter would not have to acquire as much talent in order to play.³

2. The word "integration" is often used as an antonym for "compulsory segregation" and "discrimination" or as a term denoting the prohibition or cessation of such practices. Its more precise and, today, more common meaning, however (when applied in a legal or policy context, rather than a demographic or descriptive context), refers to the conscious inclusion of a certain number of persons in a program because of their race in order to overcome a "racial imbalance" caused by such factors as uneven geographical distribution or an uneven incidence of need, talent, or other relevant criteria among racial groups. This type of practice is identical to a quota system and is what we shall mean when we use the term "integration."

3. In this example the group chosen to be benefited would be under-inclusive with respect to those individuals deserving of the benefit and over-inclusive with respect to those individuals who are undeserving. The injustice of under-inclusiveness in dispensing benefits is easy to see. Even when the supply of benefits is limited, justice demands that they be

The ideal of justice is equality among individuals, and equality among groups is unjust by definition insofar as it is achieved at the expense of equality among equally deserving individuals. A group is nothing but an abstraction defined by arbitrarily selecting one aspect of the concrete individual from among an infinite number of them. When that aspect has no relation to the judgment at hand, designation of the group defined by that aspect as the entity deserving of just treatment denies justice to the concrete individuals who themselves make up groups.

Judging an individual only by factors related to the purpose of the judgment is one of the definitional principles of justice. If one is dispensing poverty money, therefore, one must, in order to act justly, look only to the need of the individual recipient, not to whether he is Greek or Mexican, Methodist or Catholic, red-haired or brown-haired, a Mason or an Elk. Similarly, if one is hiring for a job, one must look only to the individual applicant's skill, not to the spelling of his last name or his skin color. Whenever one person is objectively more entitled to a benefit than is another, but the benefit is given to the other because of his group affiliation, the former has been treated unjustly even if there has been equality of treatment among groups. Therefore, only those criteria objectively relevant to the purpose of the judgment should be considered in decisions regarding benefits and burdens, and this requirement holds *even if the result is inequality among groups*.

If it be asked how justice can tolerate inequality among groups such as racial or ethnic groups, the response must be to ask why we recognize groups at all (other than groups defined by criteria objectively relevant to desert) and why racial and ethnic groups in particular. For example, one could point out that "blacks" are proportionately underrepresented in weight lifting and proportionately

dispensed to the *most* deserving of the class of deserving individuals. Similarly, the injustice of over-inclusiveness in dispensing burdens is apparent. What is sometimes less apparent is the injustice of under-inclusiveness in dispensing burdens or over-inclusiveness in dispensing benefits. However, under-inclusiveness in dispensing burdens represents either arbitrariness or, in the case of official or semi-official decisions, improper partiality. In a sense it is over-inclusiveness with respect to those burdened, since they are indistinguishable from others not burdened. Likewise, over-inclusiveness with respect to benefits is always under-inclusive with respect to those who are not included but who are as deserving as some who are included. It, too, represents arbitrariness or improper partiality by officials.

overrepresented in basketball; in making such an observation, one is dividing the population racially. If we divided it according to hair colors, religious groups, political affiliations, family size, hobbies, etc., we would undoubtedly find each group either proportionately underrepresented or overrepresented in those sports. Yet none of these findings would cause us to feel that injustice was being perpetrated so long as we believed that talent, drive, and similar factors affecting ability to participate were the only considerations in selecting participants in those sports. Only if membership in those hair-color or other groups were being used in the selecting process, in addition to or in place of ability, would we feel a sense of injustice. In other words, group inequality as such is never unjust; it becomes of interest only when it may be *evidence of individual inequality*.⁴ It is only by starting from the assumption that *groups* should receive equal treatment (hence, compulsory integration and quotas) or that one group whose defining element(s) is in no way objectively related to desert should receive better treatment than another (hence, "white" or "black" supremacy) that we are led to considering group membership as a criterion for decisions regarding benefits and burdens.⁵

The mere observation that certain benefits are distributed in certain proportions among groups says nothing about the justice of

4. The same argument may be presented in a variety of ways. A person feels that a group to which he belongs is receiving unjust treatment only if he believes that individuals within it are treated unjustly. One would not feel, for example, that blue-eyed men were treated unjustly at Princeton merely because they were underrepresented in the student body unless he believed that Princeton took eye color into account in its admissions policies. On the other hand, if blue-eyed men were admitted in a representative number, or quota, there would be a justifiable contention of injustice if blue-eyed men were proportionately more or less objectively qualified (as scholars) than those of other eye colors. Similarly, one would expect to find tall men proportionately better represented on basketball teams than short men (because height is objectively relevant to basketball talent) and "black" men proportionately better represented on sprint teams (because "blacks" tend to have a muscle structure more conducive to good sprinting). Indeed, if we found the proportion of tall and short men on basketball teams and of "blacks" and "whites" on sprint teams equal to their proportions in the population at large, we would have evidence (but would not know) that tall men and "blacks" were being discriminated against in their respective sports. (Even here, however, it is not the underrepresentation of tall and "black" men which is unjust but the underrepresentation of the most talented individual athletes.)

5. Of course, it is assumed throughout that it is never a proper purpose, in the dispensing of public benefits and burdens, to show partiality toward certain groups, such as particular races, nationalities, religions, or people who are handsome or who have short hair, when membership in these groups is otherwise irrelevant to rights and duties. Favoritism can never produce entitlement, and public officials and others performing public functions must act on the basis of entitlement only.

such a distribution, not only because it says nothing about how individuals are treated vis-a-vis one another, but also because the choice of groups to compare is arbitrary. Thus, the discovery that the benefits are distributed evenly among racial groups may imply not only that individuals have been treated unevenly, but also that eye color groups, hair color groups, religious groups, fraternal groups, political groups, occupational groups, hobby groups, and others have not received proportional shares of those benefits. Conversely, what appears as an unequal distribution of benefits among racial groups might, if the population be divided religiously and not racially, appear to be an equal distribution of benefits among religious groups. One can always divide the population into groups which will be receiving unequal treatment *as groups*, and there is no right or wrong way to group the population so long as none of the groupings is objectively relevant to the purpose at hand. Since the only equality which can be meaningful in any nonarbitrary sense is equality among individuals having the same measure of entitlement as determined by criteria relevant to the purpose of the treatment in question, inequality among groups must be considered ethically irrelevant.⁶

Although dividing the population into certain groups and not into others is always arbitrary insofar as justice is concerned when none of the groupings bears objectively on entitlement, some divisions may, of course, have a historical foundation. Throughout history nations have made legal distinctions among their people—most commonly on the bases of religious belief, ancestry (race, ethnic group, social class or caste, etc.), national origin, political affiliation, and, in some instances, physical features such as hair or eye color. While this fact explains why some people are tempted to regard membership in certain groups but not in others as relevant to entitlement, it does not render such membership relevant and

6. It does not help to argue that each decision should produce group equality *no matter which way the community is grouped*. Since groups are abstractions from concrete individuals defined by given characteristics or combinations thereof ascribable to the individuals, the number of possible groupings of individuals is infinite. Thus, the only decisions which would produce group equality no matter which grouping were chosen would be those treating every individual in the community equally, such as those giving *everyone* the job of policeman, or a welfare check, or a guaranteed loan, etc.

nonarbitrary in actuality. History can only bear witness to, but cannot sanction, that which is objectively unjust.

In addition to the explanation provided by history of our temptation to use group membership criteria in assessing entitlement, we all share an interest in the various groupings of mankind, an interest which may be quite legitimate. The groupings are nothing more than aspects of individuals which they share with others, and knowledge about an individual would be impossible without knowledge of the groups to which he belongs. In deciding who is entitled to benefits, we are compelled by the requirements of justice to determine which individuals belong to the group of needy persons, the group of talented persons, or whichever group is relevant to the purpose of the decision. On the other hand, if we are theologians, anthropologists, geneticists, physicians, sociologists, historians, politicians, the Census Bureau, or the man in the street, we might be interested in groups to which the individual belongs and which have no bearing on his entitlement—groups such as races, ethnic minorities, physical characteristic groups, religions, fraternal societies, political parties, occupational classes, etc. Justice does not require that we abandon our interest in all these groups which are irrelevant to entitlement; it merely precludes our treating them as unique legal or ethical entities and granting their members benefits not available to others as objectively deserving.

In conclusion, the requirements of justice are based upon the principles of democratic-individualism, the fundamental ethic of Western man, which recognizes and affirms the ethical primacy of the concrete individual to the multitude of abstract groups of which he is a member. It follows from these principles that justice demands individual equality, *i.e.*, that individuals be treated differently only to the extent that they are different in some manner relevant to the purpose of the treatment. The justness of a society, therefore, must be measured by the extent to which irrelevant group memberships are disregarded in decision-making.

II. DEFINITIONAL DIFFICULTIES IN THE USE OF RACIAL AND OTHER ANCESTRAL GROUP CRITERIA IN DECISION-MAKING

Inherent in the world where one's entitlement and freedom of association and movement⁷ depend upon one's group membership is

7. Although the discussion has referred and will continue to refer primarily to decisions allocating benefits and burdens, illegitimate use of group membership criteria can result in arbitrary restrictions on freedom even though the restrictions are placed equally on every one. Thus, ra-

the problem of how many and which groups are to be recognized as such and of whether a given individual belongs in one group or another (the problem of group definition). Where the groups are defined by certain hard physical facts, such as eye color and sex, we have no difficulty determining the number of groups in question and, from there, the group to which each individual belongs. Certain other physical facts, such as skin color, weight, and height, present more of a problem because they form a continuum without logical points of division; the choice of how many such groups exist would determine, of course, to which group each individual belongs, but it would have to be an arbitrary choice.

Where the groups are defined by "softer" facts containing elements of judgment, such as occupational groups, religious groups, and income groups, the task of definition becomes more difficult. The reason for the additional difficulty is that we almost always have some purpose beyond mere description in making such definitions and therefore our definitions, to be at all useful, must be relevant to the purpose motivating the task of definition. Thus, if someone asks us to define a Catholic, or a plumber, or a level of income, we should before offering a definition ask him why he wishes to know.

Groups which are to be defined at least in part by ancestry present a special difficulty because it is difficult to conceive of a rational purpose for seeking the definition. The "races" of mankind, for example, are apparently understood to be groups which are directly descended from different historical ancestors and which have had no relation to one another since the time of those ancestors.⁸ The choice

cial quota systems for public housing based on the racial percentages of those who, on a basis of merit, qualify for public housing restrict everyone's freedom equally and deny no one who is deserving the benefit of public housing. Similarly, miscegenation laws, or laws providing for separate drinking fountains for "blacks" and "whites," restrict no one racial group more than any other. It could be argued that an arbitrary restriction on everyone's freedom nonetheless harms only those who desire to exercise that freedom. In this way every arbitrary restriction of freedom, even if applied to everyone, results in an unjust inequality of benefit or burden between those to whom the freedom is of value and those to whom it is not. It is useful nevertheless to distinguish decisions which on their face treat persons unequally from those which restrict all persons alike. (See the discussion of the relation of due process to equal protection, *infra*, pp. 239-40.)

8. It is important to stress that, as they are generally used, racial terms

of the historical ancestors has to be arbitrary, as does the classification of individuals produced by the intermarriage of members of different races, unless we know the reason for needing to make the classification. About the only purpose for which it may still be relevant to speak about races in terms of common ancestry is to predict the occurrence of a particular genetic trait in an individual; and it is doubtful that even those groups found to carry a given trait would correspond with the three to five "races" of mankind commonly thought to exist. Since it is not clear what other purpose or purposes are served by the cultural practice of dividing mankind into a handful of "races," it is impossible to ascertain what the cultural definition of a race is, *i.e.*, what hard facts distinguish one race from another in common usage. Unlike the definition of a sex, which utilizes a physical characteristic relevant to a specific biological motive, *i.e.*, reproduction, the definition of a race corresponds to no specific facts because it is relevant to no clearly ascertainable motive accompanying the use of racial terms.

It should be noted that the ease with which we use racial terms in no way means that in so doing we have in mind a definition of race. When we use racial terms to describe a person we usually have in mind, not a definition of race, but a model of how other persons would use those racial terms. When asked to define what races are we could only respond that races are groups of persons related to common ancestors, that there are only a handful of races in the world, and that physical characteristics are generally the best evidence of a person's race, absent documentary evidence of his ancestry. Beyond this we could not go.

Even without regard for the problems of definition, the everyday usage of racial terms is often not as easy as it appears. When we are asked to classify persons who are the products of a racial intermarriage we become painfully aware of how irrelevant to any purpose of ours and, hence, arbitrary, any classification will be. It is only because we can generally put out of mind the fact that *all* persons

do not refer primarily to physical appearance but to ancestry. Because common ancestry tends to produce similarities in physical characteristics, the "races" of mankind are often described by their most salient physical characteristic, *viz.*, skin color. But because it is the ancestries producing the skin colors, not the skin colors themselves, which define the races, it is not inconsistent to say that two persons (for example, brothers) whose colors are markedly different belong to the same race or to speak of a "black" man as having "passed for white." Of course, if by the races of mankind we *did* mean groups defined by physical appearance instead of ancestry, then it would be even clearer to us how arbitrary and irrelevant our groupings were.

are of mixed ancestry that we are able to use racial terms with any confidence that we are referring to something objective and relevant to our purposes.

The problem of group definition is hardly easier when we attempt to define those ancestral groups which we do not regard as races, such as ethnic groups. Our concept of an ethnic group, derived from our usage of ethnic group terminology, is a *mélange* of various imprecisely delineated characteristics—*e.g.*, having ancestors who lived in a particular nation or territory during a particular historical period, the boundaries of the territory and historical period being quite vague or else arbitrary; sharing a common culture (which has no clear definition) or a common history (which everyone has to some extent); or having ancestors who shared a common culture or common history. When asked to define a particular ethnic group we discover how arbitrary and therefore irrelevant to our purposes any definition in terms of national or territorial origins, culture, and history will be. Does a person who no longer shares in the culture of the group nonetheless belong to the group if his ancestors did? Is any person who speaks Chinese and eats Chinese food Chinese? Is an Indian whose ancestors lived in the territory of Mexico *before* it became the nation of Mexico a Mexican-American? Would he be so if he spoke Spanish? But had no Spanish ancestors? Ate no tamales? Is someone who is related by one-sixteenth part to slaves brought from Africa to America in the seventeenth century, and who likes “soul” food and jazz, but who is fair skinned and speaks with an Oxford accent, a “black”? Would it make any difference to whether a French food is really “French” that it originated in Spain? Are Jews an ethnic (ancestral) group or a religious group? What is an Italian surname? Any name in the Rome telephone directory? Is an Alsatian French or German? Should Latvians be deemed a distinct ethnic group or included in a larger group or further subdivided? Is the child of an American father whose ancestors went from France to Mexico in the 1850’s, who speaks both Spanish and French but likes German cuisine, and of an American mother whose grandparents were Greeks but whose parents had migrated to Serbia *before* it became part of Yugoslavia, a Mexican-American, a Mexican-Serb, French-Yugoslavian, etc., or is he just a person?

It does not help in defining races and ethnic groups to say one

belongs to that ethnic group to which *he thinks he belongs* or to which *others think he belongs*. People believe they and others belong to racial and ethnic groups because they believe that these groups are objective, real, and definable and that membership in them is relevant to some purpose. No one who believes he belongs to a certain racial and ethnic group thinks that his membership in these groups depends solely upon his belief in such membership. Belief in the objective reality, definability, and relevance of such groups has, indeed, been the cause of *real problems* of prejudice and discrimination that have plagued and continue to plague mankind, and these problems and how they should be handled will be discussed later.⁹ But it is one thing to deal with problems created by mistaken beliefs and quite another to act as though the beliefs were not mistaken.

It is obvious that an official or other person charged with making a decision allocating benefits or burdens or restricting freedoms of individuals based on their membership in a racial or ethnic group must have in his mind some definition of the groups involved. Logically he cannot even be "mistaken" about a particular individual's group membership unless he first has a definition of the group with which to work. But, as we have shown, ancestry itself is logically irrelevant to almost any conceivable legitimate purpose motivating allocations of benefits and burdens and restrictions on freedom because it is relevant only to genetics. Therefore any definition of racial and ethnic groups which retains their meaning as ancestral groups will be either arbitrary or else only of genetic relevance.¹⁰ Even those "definitions" which refer to how others de-

9. Those "definitions" which refer to what others think races and ethnic groups are have some surface relevance to decisions dealing with prejudice. But since they do not include the element of common ancestry, they are not truly definitions of races and ethnic groups. Moreover, they vary in content depending upon whose prejudices are in question, and they depend to some extent on how the victim of prejudice identifies himself, or whether he chooses to play the irrational game of racial and ethnic classification at all. Finally, because those with prejudices generally lack definitions themselves (which is one reason why they are not able to see the irrationality of their prejudices), they often look to officials and others charged with making decisions of public importance to discover who is a member of what racial or ethnic groups; this involves the decision-maker who would use racial and ethnic concepts to fight prejudice, despite his awareness of their nonobjectivity and irrelevance, in the deceitful, damaging, and self-defeating enterprise of reinforcing, by stamping with legitimacy, the beliefs in the objectivity and relevance of those concepts which have caused the problems.

10. Of course, to say that racial and ethnic group definitions must be arbitrary and irrelevant to any legitimate purpose in allocating benefits and burdens and restricting freedom is not to deny that such definitions

fine races and ethnic groups, discussed in the preceding paragraph, can have no clear, fixed, nonarbitrary meaning because prejudices vary with the person who is prejudiced, with the victim, and with the definitions of the decision-makers themselves. In any case, they are not definitions of races and ethnic groups, but only definitions of victimized groups, since they may or may not refer to true ancestral groups.

The lack of racial and ethnic definitions renders actions which purport to be made on the basis of race or ethnic group membership wholly arbitrary. If these actions are those of state officials charged with implementing a policy of allocating benefits and burdens or restricting freedom based on racial and ethnic group membership, this lack of definitions and consequent arbitrariness should render their actions unconstitutional. The California Supreme Court recognized this fact in *Perez v. Sharp*, 32 Cal.2d 711, 728-32, 198 P.2d 17, 33-34 (1948). If policies based upon race or ethnicity were to be challenged for the lack of any nonarbitrary racial and ethnic definitions, therefore, the challenge would logically have to be sustained, unless arbitrary action by officials is now to be countenanced. The case against the use of racial and ethnic criteria in decision-making, especially insofar as state officials are concerned, could rest entirely on this lack of criteria by which to define racial and ethnic groups.

The various arguments which have been offered as justifications for using racial and ethnic criteria in decision-making will now be analyzed. It will be shown that each justification entails a different definition of racial or ethnic group, as might be expected in view of the fact that each justification is based on a different purpose. It will also be shown that, if the purposes giving rise to a definition of a group are legitimate, then that group definition will be unrelated to ancestry and therefore will not be a definition of a race or ethnic group.

have been attempted. The Union of South Africa, the states of the South during the era of Jim Crow, and Nazi Germany provide examples of attempts at racial and ethnic definitions, and surely the individuals in those countries and states had a great deal at stake in how those definitions were made. Significantly, with the possible exception of South Africa, genetics were thought to provide the rationale for using racial and ethnic criteria in allocating benefits and burdens and restricting freedom.

III. THE PROFFERED JUSTIFICATIONS FOR USING RACIAL AND ETHNIC CRITERIA IN DECISION-MAKING

A. Discrimination

1. Past Discrimination Against the Individual

One justification which is often given for the practice of dividing society into racial and ethnic groups, with its resultant entitlement and integration quotas (or segregation quotas, if the advocate is separatist in philosophy), is that some persons have suffered and are still suffering from racial and ethnic discrimination. (We shall here use the example of "white" discrimination against "blacks," or, occasionally, "browns," "yellows," and "reds," because of its current prominence as a social issue.) The remedy to this situation, it is argued, is "reverse" discrimination (*i.e.*, a policy of favoring "blacks" over "whites" in granting privileges) or else a racial or ethnic quota system.¹¹ There are several objections to these proposed solutions to the problem of past discrimination.

First, it is not the case that racial discrimination, whether against "blacks" alone or against "browns," "yellows," and "reds" also, is the only kind of invidious discrimination which has occurred and does occur in this country. "White" people have been discriminated against because of their religion, their sex, their age, their country of origin, their politics, their appearance, their mannerisms, their income, and for many other reasons. Some have even suffered racial discrimination at the hands of "blacks" and other racial minorities. Some people of all races have been discriminated against for more than one reason. If we are to divide the population into groups of entitlement defined as those who have been discriminated against for the same reason, then in which group shall we put Chinese Jews, aged Negroes, Mexican women? And what if new types of discrimination (based, for example, upon hair color or eye color) occur which cut across the groupings that we have made?

Second, it is misleading to think of discrimination because of

11. As the discussion in Section I suggests, a "black"- "white" quota system is in fact a system of reverse discrimination if under it less objectively qualified "blacks" obtain benefits which would otherwise have gone to "whites". On the other hand, if under it the proportion of each remains the same as it would have been with the use of objectively relevant criteria, then the use of a quota system is superfluous and merely adds a wasteful step to the bureaucratic process. Finally, if under a quota system "blacks" obtain fewer benefits than they would have under a system organized around objectively relevant criteria (a situation analogous to the "Jewish quotas" of the past), then the use of quotas actually perpetuates the present direction of discrimination.

group membership as the problem of the group rather than the problem of the individual. There are many persons who belong to groups whose members are usually discriminated against but who themselves have not suffered discrimination. Moreover, in order to show that they have been the victims of unjust discrimination because of group membership, even those individuals who have been discriminated against unjustly need only demonstrate that they have been denied freedom or some other benefit to which they were objectively entitled because it was *believed* that they belonged to a disfavored group; they do not have to show that they in fact belonged to that group. If a "white" man is denied a job because someone erroneously thinks that he is a "black" he is being unjustly discriminated against—not because a mistake is made as to his race, but because he is being denied something for a reason which, *even if true*, is irrelevant. In other words, it is not the fact that his race is mistaken, but the fact that his race is irrelevant, which makes his treatment unjust. Only *apparent* group membership, therefore, and not *actual* group membership is relevant to the problem of discrimination. Further, since not all persons who apparently belong to the disfavored groups will have been discriminated against, the only group which qualifies for relief from discrimination is the group which is defined as those individuals who have suffered unjust discrimination—which is to say that the problem of discrimination is a problem faced by individuals, not groups. It would be perverse to "solve" the problem of unjust discrimination among individuals on the basis of group membership by discriminating in favor of all members of one group at the expense of all members of another, regardless of whether all members of the former had suffered from discrimination and all members of the latter had been spared such discrimination or had benefited thereby. It would be equally perverse to correct such injustice by establishing quota systems, since quota systems are themselves unjust when they deny, on the basis of group membership, that to which the individual is objectively entitled.

Third, even if it were true (as it surely is not) that all individuals who had been discriminated against unjustly shared a characteristic in common besides that discrimination, such as a certain minimum percentage of sub-Saharan, seventeenth-century African ancestry, and that all persons who had such a characteristic had suffered

unjust discrimination, there would still be no justification for such "group" measures as quotas or benefits given to persons solely because of their group membership. The *individuals* who had been discriminated against because of their group membership would be entitled as *individuals* to that of which they had been unjustly deprived by such discrimination and at the expense only of those individuals who had perpetrated or benefited from the discrimination. Justice requires no more, and to go further would be to create new injustices.

Finally, the fact that the problem of unjust discrimination is really not a racial or ethnic problem at all but is, rather, a problem of specific individuals as individuals becomes apparent if one considers the definition of "racial" and "ethnic" groups which would be required if we were attempting to devise a policy of helping the victims of discrimination. If the discrimination is because of race or ethnic group membership, the group we wish to aid is defined as those *individuals*, regardless of their "true" racial or ethnic identification, *who have been discriminated against for racial or ethnic reasons*. Although the set of victims thus defined might or might not coincide empirically with any groups of individuals commonly regarded as races and ethnic groups, *in principle* it does not, for its definition does not contain ancestry as an element. If we feel, as we must, moreover, that victims of racial and ethnic discrimination are no more entitled to relief than other victims of discrimination based on *irrelevant* group-membership criteria, such as sex, age, looks, etc., our set of deserving victims is now defined as those *individuals* who have suffered discrimination based on *any type of irrelevant group membership*. Not only is this set distinct in principle from any races or ethnic groups as they are commonly defined, but unquestionably it would not correspond in fact to any such groups.

A word should be said in this connection about the problem of unfair testing. It is sometimes argued, erroneously, that if a test (*e.g.*, for a job) does not measure factors relevant to entitlement (*e.g.*, does not measure ability to perform the job), so that the group which can pass the test is not identical to the groups most entitled (*e.g.*, best qualified), but is under- and over-inclusive with respect thereto, then using that test is racial or ethnic "discrimination" if proportionally more of those wrongfully disqualified by the test belong to one racial or ethnic group than to others, *even if it is not the tester's purpose to discriminate for racial or ethnic reasons*. Unfortunately, even the United States Supreme Court has recently adopted this argument. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). (See note 34 *infra*.)

The fallacy in the argument is not hard to discover. Every test for entitlement which tests for factors unrelated thereto will be unjust to those who failed the test but who are objectively more entitled than others who passed the test. Within the group of unjustly treated individuals, there will always be proportionally more of some groups than of other groups. For instance, without regard for the problem of racial and ethnic definition, if within the unjustly treated group there are proportionally more "blacks" than "whites," there might also be, depending on how else this group is divided, proportionally more brown-haired persons than blonde-haired or brown-eyed persons than green-eyed, or Baptists than Catholics, or Democrats than Republicans. The possible group inequalities here are infinite. (See discussion accompanying notes 4-6 *supra*.) Are we, therefore, to say that an infinite number of "discriminations" are taking place simultaneously, remembering that no discriminatory motive has been posited? Would the discrimination against those objectively entitled but unable to pass the test be any less unjust even if all possible groupings of the unjustly treated individuals corresponded in their proportions to the proportions of the groups in the population at large? It is understandable, given the current emotional climate, why some persons are motivated to label all unjust discrimination as racial or ethnic discrimination. It is also understandable, given that the Civil Rights Act of 1964 prohibits only certain types of unjust discrimination, why the Supreme Court was motivated to label as *racially* discriminatory unjust tests which discriminated against all persons, regardless of race, who could not pass the tests but who could perform the jobs for which they were tested. But unless the unjust criterion upon which denials of benefits or the impositions of burdens are based is a racial or ethnic one, the unjust discrimination is not racial or ethnic discrimination.

The answer, then, to the problem of unjust discrimination is to prohibit it in as many of its manifestations as are feasible, to give relief to those *individuals* who are its victims, *regardless of their race or ethnic group*. The extent of the relief and who should pay it remain problems, however, which should be discussed before proceeding further. In order to do so it is necessary to discuss all the forms that unjust discrimination against individuals can take (not the infinite number of reasons which can make discrimination unjust).

- (a) Discrimination by private persons which is specifically prohibited by law.

Some (but not all) unjust discrimination is prohibited today by specific laws. Since the laws provide the measure of damages and who shall pay them, this form of discrimination presents no problem.

- (b) Discrimination by private persons which is legal at the time it occurs.

- (i) Discrimination in the use of one's capital.

The most common form of this type of private discrimination and the most common form of private discrimination now prohibited by law is discrimination by employers in hiring.¹² The harm caused by such discrimination is the loss of earning power of the victim. The principal beneficiary of such discrimination is the person hired in place of the victim. The employer, too, may be said to benefit from the discrimination, although the possible benefits he derives are of several different types. First, he may benefit by indulging in his preferences for certain types of persons, thereby making himself better off than he would have been had he not discriminated in hiring his new employee. For example, he may be an Italian who derives pleasure from hiring other Italians, and he may discriminate against a Pole and in favor of an Italian, not because the Pole is a Pole, but because he is not an Italian. Another example would be that of an employer who feels neutral with respect to secretaries who are plain in appearance, but who enjoys the presence of pretty secretaries. Second, the employer may benefit, in a negative sense, by indulging in his prejudices against certain types of persons, thereby not making himself worse off than he would have been if he had not discriminated. For example, if he derives no particular pleasure from hiring members of most groups, including Italians, but feels displeasure if he is forced to hire a Pole, then his discrimination against a Pole and in favor of an Italian is because the former is a Pole. (The line between the above two types of discrimination, or whether there is a line at all, and in what sense the benefits derived therefrom are economic benefits like those derived from

12. Other forms of discrimination which are similar in that they, too, involve the use of the discriminator's capital (or labor) are discrimination by consumers based on their dislike of particular producers for reasons unrelated to the quality of the latter's goods, discrimination by tenants against landlords for reasons unrelated to the quality of the rental property, and discrimination by employees against employers for reasons unrelated to wages, working conditions, etc. These types of discrimination have received scant attention by legislators or even by philosophers.

hiring a more industrious employee, have rarely been discussed in legal and philosophical literature.) Another type of benefit, which may be either positive or negative, is determined by the preferences and prejudices of persons other than the employer himself. For example, if the other employees 1) like Italians or 2) dislike Poles, the employer may hire an Italian and turn down a Pole in order 1) to increase productivity or 2) to avoid losses caused by low morale.¹³

(ii) Discrimination in the enjoyment of one's property.

Most discrimination which is not today prohibited by law is discrimination by persons owning property in allowing others to use that property. Some of this discrimination is prohibited (e.g., public accommodations laws, fair housing laws, etc.), but much is allowed (e.g., in inviting persons to one's house, in donating one's money to charities and churches and relatives, or in choosing friends). The classes of beneficiaries of this discrimination and the types of benefits that can be derived therefrom are the same as those listed in the preceding paragraph.

What damages, if any, should be awarded the victims of either of the above two types of private discrimination when the discrimination was legal at the time it occurred, and from whom should this compensation be exacted? Should it matter which type of private discrimination the victim suffered (i.e., in employment, in the enjoyment of another's property, and, within the latter type of discrimination, the almost infinite number of contexts in which discrimination is possible)? Should it matter which of the types of "benefits" the discriminator received? What if the discriminator and beneficiary relied on the legality of the discrimination so that they or their heirs would suffer terrible injury if forced now to compensate the victim? What if the beneficiary were innocent of any implication in the discrimination? Should it matter if the discriminator and beneficiary are now poor? What if others besides the discriminator and beneficiary benefited because of the discrimination, including, perhaps, the victim himself (e.g., certain "black" professionals who were discriminated against by "whites" but who became wealthy from catering to other "blacks," or members of many other groups who became wealthy because discrimination against them resulted in discrimination in their favor by members

13. See note 1 *supra* for a discussion of the personal tastes in people of employers and employees.

of their own groups)? What if others besides the direct victim of the discrimination were burdened by the discrimination (e.g., economic depression caused by racism in employment)? Should it matter that almost everyone has been at many times both a victim and perpetrator of unjust discrimination of some type, that everyone has been benefited and harmed by discrimination, both as a member of a favored class and as a member of a disfavored class, and that some persons are, as a result of intermarriage, descended from both perpetrators and victims of the same kind of discrimination? And if we cannot justly exact damages from the discriminator or the beneficiary, can we do so from society in general? From those who opposed discrimination? From those who opposed discrimination morally but who opposed antidiscrimination laws as a matter of principle? From those who supported antidiscrimination laws? The descendants of any of these? Of what significance is it that many of the victims of private discrimination, who are now wealthy despite or because of such discrimination, will be forced to pay more in taxes than they will receive in compensation if the obligation to compensate is extended beyond the discriminators and beneficiaries? How far back in time and to what locales should we trace private discrimination? (See discussion accompanying note 14 and pp. 214-15 *infra*.)

It is perhaps in anticipation of the myriad difficulties suggested above that few contend compensation should be awarded victims of private discrimination which was legal when it occurred, unless the right to discriminate was not extended to everyone, as, for example, in slavery. Very few of the almost infinite number of historical injustices can be remedied today without causing other injustices. For example, when a murderer dies a natural death after killing his victim and leaves no estate, the injustice to the victim's family cannot be remedied; it can only be spread to the murderer's family or to society. Most calls for compensating victims of discrimination, recognizing the limitations in remedying past injustice, focus only on discrimination required or practiced by government.

- (c) Discrimination by government officials which is specifically prohibited by law at the time it occurs.

Often government officials have unjustly discriminated against individuals though they acted illegally in so doing. The usual remedy for such discrimination is to hold both the officials and the government liable for damages. Like illegal private discrimination, illegal official discrimination presents no problem in terms of how to deal with it.

- (d) Discrimination by government officials or private persons compelled by law.
 - (i) Discrimination denying freedom of association but not benefiting or burdening the separated groups unequally.

Historically, the most common discriminatory state laws have been those which did not treat different groups unequally, but which denied them the freedom to associate in certain contexts, such as in eating in restaurants, going to schools, swimming, riding on buses or trains, etc. It should be recalled (see note 7 *supra*) that denial of freedom based on irrelevant group membership criteria, while unjust, is not so because it treats the restricted groups unequally, but because it arbitrarily restricts those members of every group who wish to associate with members of other groups. The only groups treated unequally are the groups of those individuals who prize the freedom to associate and those who do not.

It is most difficult to assess the economic harm to individuals caused by truly separate but equal segregation. Perhaps some individuals, had they been allowed to associate, would have found such association mutually profitable in terms of knowledge, skills, or wealth. Clearly, members of all the segregated groups lost something from the segregation, but the problems of how to evaluate the loss, to whom to award it, and from whom to exact it seem to admit of no solution.

- (ii) Discrimination resulting in the confiscation of the victim's property or denying him a freedom enjoyed by others.

The type of discrimination practiced by Nazi Germany against Jews is an example of this type of state-imposed or state-supported discrimination. In the United States most discrimination of this extreme sort disappeared with its principal example, slavery. The just remedy for this type of discrimination is for the government to restore the victim to the position he would have enjoyed without the imposition of the discrimination. In the case of forced labor, such as occurred in American slavery, the just remedy would be to compensate the victim for the burden imposed, less, of course, any compensation he did receive. Since American slavery was not im-

posed by the states but merely allowed by them, the slaveholders and their descendants would seem to be the most obvious persons to hold liable; but the fact that slavery was legal at the time it occurred might make it unjust to hold them so. However, state-*allowed* confiscation of property and restriction of freedom by private persons, when not allowed for *all* private persons (but only "whites" in the case of slavery), *can* be considered state-imposed burdens, the principles for remedy of which will be considered in the following subsection.

- (iii) Discrimination resulting in the denial of a benefit extended to others no more deserving or the imposition of a burden not imposed on others no less deserving of the burden.

The typical examples of this type of state-imposed discrimination are giving higher welfare benefits, better governmental jobs, or better schools to some but not to others equally deserving of the benefits. One problem arises with respect to the damages caused by this type of discrimination: are they to be measured by 1) the benefits others received or 2) the benefits which the victims of the discrimination would have received had those who paid for the benefits been given freedom to designate the beneficiaries? Another problem in the area of public discrimination in dispensing benefits concerns those burdened in order to pay for the benefits: if they objected to the discriminatory manner in which the benefits were dispensed, should they be allowed to recover what they paid in taxes to provide the benefits? The remaining problems are similar to the ones that arise in the area of private discrimination. Should society, including those who opposed the discriminatory laws and the descendants of the supporters of those laws, have to pay the damages? What if victims of the discrimination became wealthy despite or because of the discrimination? Should they receive benefits? Should they pay taxes to compensate themselves? What if many who were not discriminated against suffered harm because of the discrimination? Should they receive benefits or pay taxes? Should the compensation be paid by the state or by the federal government in the case of state discrimination? What if the state discrimination were a violation of federal law? What if many of those who voted for discriminatory laws, or their descendants, have left the state, while many of those who now live in the state have entered since the time the discriminatory laws were taken off the books? What if the state is impoverished? What if federal funds were used in addition to state funds in providing the benefits?

While the above questions raise serious issues involved in com-

compensating the victims of discriminatory governmental practices in providing benefits, a sufficient case can be made out for forcing the discriminating government to compensate the victims of discriminatory laws to the extent of the benefits lost, as measured by the benefits given those no more deserving than the victims. The governments in such cases were not merely acting as conduits for charitable donations by their citizens, but were declaring an obligation of the wealthy to aid the needy and a right of the most talented to state employment. Had the governments not been declaring that their taxpayers had obligations, the proper remedy would be one owed to the taxpayers who wished to make some other disposition of their money than that imposed upon them by the governments. The taxpayers would be the principal victims of discrimination by the states and would have suffered an unjust confiscation of their property. In their capacities as employers, the government, unlike private employers, could not derive benefits from discrimination because they could have no "personal" tastes and preferences and because their property belonged to all. Since the governments had obligations to provide benefits to help the needy and to hire the most talented for government jobs, they breached these obligations by practices of unjust discrimination, i.e., by withholding benefits from the more deserving in favor of the less deserving.

The federal government should theoretically be liable for what it would have had to contribute to the states had the latter fully met their obligations, as well as for breaches of its own obligations. The guilty states should theoretically be liable for the remainder of the damage caused by their discrimination. Although such a result is unfair to those in the states who opposed the discrimination or who immigrated after it ceased, it is an unfairness built into a system of federalism and corporate responsibility for governmental delicts. Moreover, since the enactment of the Fourteenth Amendment, all denials of equal benefits and burdens based on irrelevant criteria should have been deemed *illegal* under the Constitution, even if they were not. The states which practiced such discrimination were in no way different from individual state officials discriminating illegally and the present citizenry of the states should be liable for past illegal actions of its governments on familiar principles of legal responsibility, even though such principles are unfair to, for example, those who opposed such discrimination. To avoid as much unfairness as possible, a reasonable time limit

should be placed on any recovery by an individual for past state discrimination, if such discrimination had not previously been declared illegal by the courts.¹⁴ (If it had been declared illegal, probably a statute of limitations would already have been developed.)

In conclusion, the definition of the group deserving of relief because of past discrimination against the individual should be modified to include all *individuals, regardless of race or ethnic group*, who themselves suffered discrimination based on any type of irrelevant reason, if that discrimination was practiced by either private individuals or state officials and was illegal at the time, or if that discrimination was imposed by state law and resulted in denial of a benefit or imposition of a burden (but not in a denial of freedom to which all were subjected, even though based on irrelevant group-membership criteria). It is important to note that this definition is clearly not in *principle* a racial or ethnic definition; and, in view of the many state-imposed discriminations in terms of the quality of schools and other public facilities—discriminations which have affected members of all races and ethnic groups—the definition will not correspond in *fact* to an ancestral group.

2. *Past Discrimination Against One's Ancestors*

If a person's ancestor would have qualified for compensation under the above definition, then there is no necessary reason why the person himself should not be able to claim compensation based on the actual harm to him caused by discrimination against his ancestor. However, the lapse of time between the harm to the ancestor and the present claim should not be unreasonably great, so as to avoid creating new injustices such as upsetting reliance and taxing totally innocent parties who would have no recourse against the culpable parties. Since it is always somewhat unjust to hold all taxpayers liable for past illegal acts of their government, the injustice is compounded as the time between the illegality and the claim increases, although theoretically one could trace harm to his ancestors resulting from government action back thousands

14. In reality, the unfairness of compelling all members of society to compensate victims of illegal acts of the government when some of the members opposed those acts is less unfair only by a matter of degree than compelling all members of society to compensate victims of private discrimination which was merely not prohibited by the government. (See discussion, pp. 209-10 *supra*.) However, the unfairness of the former type of corporate liability is outweighed by the practical considerations involved in having a government which purports to act on behalf of all, so long as a reasonable statute of limitations on recovery for past governmental discrimination is imposed.

of years, giving rise to the somewhat metaphysical question of when a past government should be deemed the same government as the present one for purposes of corporate liability.

The group which could recover for discrimination to its ancestors would be no more a racial or ethnic group than its ancestors were. (See subsection (a) (iii) *supra*.)

B. *Disadvantagement*

Because there are proportionately more unjustly disadvantaged persons among "blacks" and certain other racial and ethnic groups than among "whites" (the language of race and ethnic groups being used here for the sake of argument but still without any clear definitions) and because much of this difference can be attributed to racial and ethnic discrimination—some in the present but most in the past—a two-fold confusion has resulted: "black" or minority ethnic group membership and "disadvantaged" are often used interchangeably; so, too, are "racism" (racial discrimination) and "disadvantagement." In turn, the proposals put forward for remedying unjust disadvantagement have often been couched in racial or ethnic terms, such as reverse discrimination, preferences and other special benefits for certain racial and ethnic groups, and racially or ethnically oriented quota systems.¹⁵

However, not all members of "black" and minority groups, defined in any way that retains the concept of the ancestral group, are unjustly disadvantaged—i.e., undeservedly poor, ignorant, or culturally deprived—and not all other persons are free from unjust disadvantagement. Programs which provide benefits for "blacks" rather than for the "disadvantaged," therefore, can result in objectively less-deserving "blacks," receiving that to which objectively

15. There is even common today a totally fallacious and Orwellian process of reasoning by which the true nonracist (one who rejects race as a legitimate criterion for entitlement) is "proved" to be a racist after all. The fallacy begins with the substitution of the word "poor" for the word "black." Since the nonracist is, as he should be (by definition), against special preferences for "blacks" as a race, he is said to be against special preferences for the "poor." Since the poor actually deserve preferences (in many cases), the nonracist is now said to be against *deserved* preferences for the poor, hence unjustly "against" the poor. Now the coup de grace: the word "black" is resubstituted for the word "poor," with the result that the nonracist is now against *deserved* preferences for "blacks," hence unjustly against "blacks," hence a racist.

more-deserving "nonblacks" are entitled.¹⁶ Such results are the essence of injustice.

1. *Poverty.*

It is easy to perceive the injustice of programs allocating benefits and burdens on the basis of race and ethnic criteria if the concern motivating the programs is with those who are impoverished economically or culturally. The logical class of deserving recipients would simply be, with some exceptions perhaps where fault, choice, or a low level of need were present, those who are impoverished; and since such a class is not defined even in part by ancestry, it cannot serve as a definition of a race or ethnic group or groups even if coincidentally it happens to be the case (which it certainly does not) that all persons who are impoverished are also related to a common ancestor and that all of that ancestor's descendants are impoverished. If impoverishment is our standard of deservedness, each individual's entitlement would derive from his membership in the group of the impoverished and not in a particular ancestral group, even if the two groups were comprised of exactly the same individuals.

2. *Poverty and Past Discrimination Against the Individual or His Ancestors.*

It is sometimes said in justification of programs using racial and ethnic criteria in dispensing benefits and burdens that some of the poor are more deserving than the rest of the poor because they have been impoverished by racial or ethnic discrimination rather than by the other causes of poverty. While racial and ethnic discrimination have indisputably played a major role in the impoverishment of certain people, it by no means follows that basing benefits and burdens upon membership in racial or ethnic groups is a just practice. In the discussion of discrimination (*supra*, p. 206) it was pointed out, first, that the logical group to aid if our concern

16. Examples of this kind of program are those which give poverty money to "black" communities or loans or tax benefits to "black-owned" businesses. Even if poverty money were given to the poor of each race *as groups* on a per capita basis so as to achieve equality among groups, injustice would still result because the average incomes of the groups would surely vary and therefore individuals with the same income would receive different amounts because they belonged to different groups. If, however, money were given to the poor of each race as groups on an average-income basis, justice would be achieved; but, as has been pointed out earlier in other contexts, the same result could be achieved by the less circuitous and artificial method of dispensing the money to *individuals* based on their income.

is with past racial and ethnic discrimination is the group defined as those individuals, regardless of their true race or ethnic group, who have been discriminated against for racial or ethnic reasons. It was pointed out, second, that there is no reason to prefer those who have been discriminated against for racial or ethnic reasons to those who have been discriminated against for other irrelevant and, hence, unjust reasons. The group with which we should be concerned, it was concluded, should be defined as those individuals, of any race or ethnic group, who have been unjustly discriminated against for any reason.

The same analysis holds if our concern is with those who have suffered discrimination and who are also poor. All we need to do is add poverty as an element in our definition, so that the group with which we are now concerned is defined as those individuals, of any race or ethnic group, who have been unjustly discriminated against for any irrelevant reason and who are poor because of that discrimination.¹⁷ This group is clearly not a racial or ethnic, *i.e.*, ancestral group.

It is not readily apparent why one should wish to distinguish the poor victims of discrimination from the non-poor victims. Perhaps it is felt that any remedy for discrimination which was not illegal at the time it occurred or was illegal but occurred too far in the past should be limited to poor victims thereof because of the difficulties and injustices, discussed before, attendant upon forcing society in general or the perpetrators or beneficiaries of discrimination to compensate *all* victims. However, if poverty caused by past discrimination, not past discrimination itself, is the basis of entitlement, we must assume that those who are poor for reasons other than discrimination are less entitled to aid. This concept of deservedness is open to serious question. There are innumerable injustices economically disadvantaging persons which do not result from invalid considerations of group membership. Examples of these injustices range from the frequent inequities of the free market, inheritance, taxation, and welfare systems of allocating resources and distribut-

17. If our concern is not only with individuals who have been impoverished by discrimination directed against them, but with those, as well, who can trace their poverty to discrimination against their ancestors, we need only add to the above definition, after "reason," the phrase "or whose ancestors have been discriminated against for any irrelevant reason."

ing income, to the crimes, torts, and frauds committed by individuals upon other individuals; from the various unfair substantive, procedural, and human aspects of the legal system of determining rights and duties, to the many unfair aspects of the educational system; from the depredations and waste of cutthroat competition to the abuses of concentrated wealth and power; from the animosities and breaches of trust of those in positions of power to the neglect of legislators and parents. Relatively few of the disadvantageous injustices in this society and this world, in fact, stem from consideration of group membership.¹⁸

Suppose it *were* considered just to distinguish in terms of desert between the poor whose condition was caused by unjust discrimination for which there presently existed no other remedy and the poor whose condition was caused by other factors, so that only those poor in the former class received aid, and only to the extent that they were damaged by discrimination, not to exceed the amount by which they were poor. Even then, the group to be aided would be defined as those persons, regardless of their "true" race or ethnic group, who are poor and whose poverty has been caused by unjust discrimination of any type against the individual (or his ancestors), for which poverty no other remedy is provided. The group thus defined would again not in principle be a racial or ethnic group, nor would it in fact correspond to any ancestral group.

C. *Future Discrimination.*

One justification that is often advanced for giving special benefits (usually job or college admissions preferences or quotas) to certain racial and ethnic groups is that those who receive these benefits will, sometime in the future, suffer discrimination. The benefit is offered now, before the discrimination has occurred; but when the discrimination does occur it will nullify the benefit and place the person in the position he would have attained had he neither received the benefit nor suffered the discrimination.

Even if we were to assume, *arguendo*, that it is legitimate to discriminate in favor of persons now who one believes will be discriminated against in the future, it would nonetheless be illegitimate

18. Those who are poor because of unjust discrimination against their ancestors seem even less deserving than those whose poverty has been caused by discrimination directed against them, for the treatment of a person's ancestors says nothing about that person's individual desert. Moreover, in terms of desert, how can we distinguish between children whose poverty is caused by discrimination against their parents and those whose poverty is caused by parental stupidity, laziness, etc.?

to discriminate in favor of races or ethnic groups. Logically, if we are concerned with future racial and ethnic discrimination, the class of individuals with whom we should be concerned would be defined as those individuals, regardless of their "true" race or ethnic group, who will be discriminated against for racial or ethnic reasons. Furthermore, since according to the analyses presented above there is no reason to prefer individuals who face racial or ethnic discrimination to those who face the multitude of other forms of unjust discrimination, the definition of the group to be benefited becomes those individuals, regardless of their race or ethnic group, who will be discriminated against for any unjust reason. Neither this definition nor the more limited one preceding it is in principle a racial or ethnic definition, since both lack the element of ancestry; and neither is likely to correspond in fact to an ancestral group.

Although it is relatively clear that the prospect of future discrimination cannot justify preferences based on race or ethnic group membership, there remains the question of whether such a prospect justifies *any* preferences to those individuals against whom discrimination is likely. That it does is open to serious doubt. In the first place, a program designed to give preferences to individuals because they will face discrimination in the future assumes that we can identify *who those individuals are*. But even if we were concerned, as we should not be, only with future discrimination based on race or ethnic group membership, it is doubtful that we could predict with any accuracy whatsoever who would suffer racial or ethnic discrimination in the future. The future discriminators would each have different operative (but not articulable) definitions of who belonged to the racial and ethnic groups against whom they wished to discriminate. Moreover, many of them would have definitions which were internally contradictory or which contradicted those of other discriminators. Then, of course, there would be persons who did not discriminate at all. An even more nettlesome problem would be presented by persons who liked to discriminate in favor of those against whom they believed others were discriminating, or who belonged to the same "race" or "ethnic" group as those facing the discrimination and who were in a position to offer the same benefits as the discriminators (*e.g.*, "black" employers hiring "blacks"). The chance of a person's suffering discrimination would depend not only on which of the above groups he encountered,

but also in many cases on how he identified himself racially or ethnically or whether he chose to play the illegitimate game of racial and ethnic definition at all; for many potential discriminators (both against particular races or ethnic groups and in favor of them), lacking clear racial and ethnic definitions themselves, would rely upon the persons with whom they were concerned to identify themselves racially or ethnically. If we include in our program, as we must, all persons who will suffer unjust discrimination of any kind, the problems of identifying such individuals become insurmountable.

In the second place, a program based on benefiting potential victims of unjust discrimination assumes that we can predict *how much they will be deprived of by such discrimination*. Will the victim lose \$10,000 from job discrimination? Will he lose merely some marginal aesthetic value through residential discrimination? The harm from discrimination will vary greatly among the victims, and the difficulties of compensating each victim-to-be caused by the variety of discriminators, victims, and reasons for discrimination are compounded even further by this uncertainty as to the harm that will be caused.

The aforementioned difficulties are compounded by the great uncertainty that necessarily attends any prediction of future attitudes. It is always possible that a group widely discriminated against today will become the object of widespread preferential treatment tomorrow. Or we may find, particularly in the case of racial and ethnic preferences, that programs which give definitions to and treat as objective and relevant such nonobjective, irrelevant concepts as race and ethnic group may help to perpetuate irrational beliefs in such objectivity and relevance; thus programs based upon predictions of future behavior must take account of the possible responses to the programs themselves.

Finally, if one gives a benefit to another based on a prediction that others will unjustly discriminate against him, then in the future one is forced into the paradoxical position of having to encourage such unjust discrimination. If that unjust discrimination does not occur and, instead, the individual given the benefit is treated justly or even given additional benefits, those who were originally denied benefits will have been treated unjustly. Only if all persons who are equally deserving are given equal treatment in the present are we justified in discouraging and prohibiting unjust discrimination which we fear might occur in the future.

In conclusion, it is evident that programs designed to compensate persons who are likely to suffer discrimination in the future

do not justify the use of racial or ethnic criteria. It is very doubtful, moreover, that such programs are justifiable at all, given the immense difficulties of predicting the scope and intensity of future discrimination and the fact that such discrimination will have to be encouraged if the programs are to succeed in achieving justice. Programs prohibiting certain kinds of unjust discrimination and dealing with them and other kinds of unjust discrimination when they occur seem highly preferable to programs which anticipate discrimination, for the former require no speculation or encouragement of discrimination.¹⁹

D. Eradication of Prejudice

Another often mentioned goal of racially and ethnically oriented programs is the eradication of racial and ethnic prejudices through the integration of labor forces, housing projects, schools, etc. Sometimes the programs so justified give benefits to members of particular racial or ethnic groups not extended to nonmembers (e.g., quotas or preferences in certain jobs). At other times the programs restrict the freedom of everyone for racial or ethnic reasons (e.g., the requirement of racial and ethnic percentages in each public housing project which reflect racial and ethnic percentages in public housing as a whole; or the requirement of racial and ethnic percentages in each public school which reflect the racial and ethnic percentages of the entire public school population).

19. One argument for preferences or quotas which deserves little attention is that which states that in some cases discrimination will occur but it will be impossible to detect. Therefore, the only possible remedy will be to impose a certain quota of members of the group which it is alleged will be discriminated against on the would-be discriminators. (This argument has been put forth recently in support of establishing racial quotas for certain jobs.) However, one wonders how it is possible to know that discrimination will take place which will be impossible to detect, unless what is meant is that the decisions in which the discrimination takes place will be made in secret or that the factors given publicly will not be the true factors upon which those decisions will be based. The remedy for secret discriminatory decisions is, of course, not an arbitrary quota, but a requirement that the factors upon which the decisions are based be subjected to public scrutiny. For example, if one is worried about discrimination against "blacks" in hiring for the building trades, one could require that all applications be reviewed by an impartial board, or even by the NAACP, as a check to see that only relevant factors are considered in hiring. Rejection of such a system for insuring that only job-related factors are considered would suggest a lack of concern for hiring the most qualified and a desire for a quota for illegitimate reasons of "group justice."

Again, as was shown in earlier analyses, the groups with whom we should be concerned are not racial or ethnic (ancestral) groups. Logically, the groups are comprised of those individuals who are prejudiced for racial and ethnic reasons and those against whom they are prejudiced, regardless of the "true" racial or ethnic status of any of them. Since these groups do not in principle (and undoubtedly will not in fact) correspond to ancestral groups, they cannot be racial or ethnic groups.

It will be noted that the goal of programs eradicating racial and ethnic prejudices is not to ensure justice for certain individuals but rather to achieve some future state of social harmony in which racial and ethnic prejudices do not exist. It is not necessary, therefore, to extend the definition of the groups with which such programs should be concerned to include the perpetrators and victims of types of discrimination other than racial or ethnic discrimination, even though the other types are equally unjust. Racial and ethnic discrimination might be more widespread than other types of discrimination and therefore more of a social problem, even though it is no more of a problem to the individuals affected (*i.e.*, no more unjust) than the other types of discrimination.²⁰

The groups of individuals who are the logical targets of programs designed to eradicate racial and ethnic discrimination (groups which are not, again, racial and ethnic groups) having been defined, the justifiability of such programs, even if they do not use racial and ethnic criteria, remains open to serious question.

First, how effective can programs designed to eradicate racial and ethnic prejudices through integration really be? If the groups to be integrated are labeled by the government as "racial" or "ethnic" groups rather than as groups of "racially and ethnically prejudiced" and "racially and ethnically prejudiced against," this categorization might in itself reinforce prejudice and hurt the victims thereof even more by giving credence to the idea that there are indeed objective and relevant differences among races and ethnic groups, *i.e.*, that such groups are real.

Even if the groups are defined merely as "racially and ethnically prejudiced" and "racially and ethnically prejudiced against," serious obstacles to effectiveness remain. How does the government

20. It is questionable, however, whether racial and ethnic discrimination is the most prevalent unjust discrimination today. Sexual discrimination, discrimination based on attractiveness of appearance, discrimination based on irrelevant paper credentials or irrelevant tests—these and other types of discrimination compete strongly with racial and ethnic discrimination for the distinction of being the most widespread discrimination.

identify those who are racially and ethnically prejudiced? How does it identify those against whom they are prejudiced? If it makes a mistake in identifying an individual as a member of the latter group, might not that individual now be subjected to prejudice which he would otherwise have escaped as a result of the government's mistake (i.e., might not the government's identifications become self-fulfilling prophecies)? What if those prejudiced have no clear or consistent definition, operative or otherwise, of the group against whom they are prejudiced? What if some individuals are in both the prejudiced and victimized groups, depending upon with whom they deal? Even more importantly, are the prejudices in question directed against all members of a group or only some members, and are they rational prejudices or irrational? (A rational prejudice is an inference based on statistical probabilities that individuals with known characteristics will possess other characteristics, such as the statistical fact that persons with long hair in Volkswagen vans are more likely than others to possess drugs and like rock music, or that persons who are poor are more likely than others to commit certain crimes, or that a middle-aged, white Iowan will probably be a conservative Republican. Such rational prejudices are unjust if the person making the judgment about another based on statistical probabilities could and should make an effort to gather more information about that individual before making the judgment. An irrational prejudice is one based on erroneous statistics or none at all.) If the prejudices are rational and are borne out by experience under the integration program (e.g., the long-haired person *does* use drugs), they may very well be strengthened by the very programs seeking to eradicate them.

Second, with respect to those programs which give *benefits* to individuals not extended to others equally deserving in order to achieve by integration the long-run elimination of racial and ethnic prejudice, one should ask whether it is ever permissible to treat individuals unjustly in order to produce some future social good. (It is not a part of the justification of the programs now under consideration, as it was part of the justification of the programs considered in the preceding section, that those individuals presently receiving benefits will suffer discrimination in the future which will leave them ultimately with no more advantages than the equally deserving individuals who do not receive benefits but who do not face discrimination; rather, the justification now under con-

sideration posits that eradication of racial and ethnic prejudice is a goal worthy of the long-term unjust treatment of those denied benefits which they deserve.) Only a very strong version of utilitarianism will accept the proposition that it is permissible to sacrifice equal treatment of the individual to the long-range total happiness of the group and will deny the ethical relevance of desert and individual equality. This strong version of utilitarianism is not the dominant ethical philosophy in this society, as is evidenced by its strong commitments to individual and minority rights and to protection of the innocent, often made at great cost to society as a whole. Moreover, when remedies which do *not* require sacrifice of the happiness of some deserving individuals to benefit the whole exist to combat a social problem such as racial and ethnic prejudice—e.g., antidiscrimination laws and programs giving benefits to actual, not potential, victims of discrimination—programs which do treat individuals of equal desert unequally are totally unjustifiable.²¹

Those programs which restrict the *freedom* of all individuals equally in order to achieve the long-run elimination of racial and ethnic prejudice (e.g., racial and ethnic integration of each school or public housing project in the same percentages as are found in the public school or public housing populations as a whole), while they do not involve denying benefits such as jobs to certain individuals and extending them to others no more deserving, they do involve an equally serious problem relating to the role of the government in a liberal society. In essence, the problem involves the right of the government to restrict the freedom of all persons and to force upon them unwanted associations on the ground that such an “education” will reduce the incidence of antisocial behavior, when the alternative is to allow freedom of association and merely to prohibit or discourage antisocial behavior.

In the first place, although education as a means of eradicating prejudices and achieving harmony has a greater surface appeal than does the criminal law, presumably because it deals with the source,

21. The same analysis of programs giving *benefits* to some but not other equally deserving individuals in order to eradicate prejudice can be applied to programs giving benefits to some but not other equally deserving individuals for the purpose of *instilling pride and ambition and eradicating inferiority complexes* of the groups which have been the victims of prejudice. In addition, it is questionable whether giving benefits such as jobs to those less objectively qualified can ever instill genuine pride. It is further questionable whether one best attacks the poison of racial and ethnic prejudice by encouraging racial and ethnic pride (as opposed to lack of shame), since racial and ethnic prejudice and pride are but the two sides of the same counterfeit coin of vesting ancestry with relevance to merit.

rather than the symptoms of discord, does not a liberal (antitotalitarian) ethic require in many cases that the government concern itself only with symptoms and not with causes? In a society with such an ethic, it is felt that once a person reaches adulthood the government can no longer actively concern itself with his moral and political education (i.e., his thoughts and attitudes), particularly when to do so entails interference with his fundamental freedoms. So long as members of all groups receive equal treatment under the law (justice) and so long as prejudices do not manifest themselves in overt acts of violence or other deprivations of rights, liberal governments have no interest in the fact that some people are prejudiced and that others are the objects of such prejudices. A major step is taken toward totalitarianism when black nationalists and members of the Ku Klux Klan are forced against their will to move next door to one another and remain there until the government officials whose function is to monitor thoughts determine that they no longer retain their prejudices. Racial views, like political or religious views which are not in harmony with the Constitution, are the business of government only to the extent that they manifest themselves in illegal acts. In a liberal democracy, there is no warrant for subjecting adults to compulsory moral and political education, especially if it takes the form of restrictions on fundamental rights to liberty and property.

Furthermore, there will be many individuals who are neither racially nor ethnically prejudiced nor the victims of such prejudice. It would be degrading to classify them as "prejudiced" or as "the victims of prejudice." (It might, of course, be equally degrading to those who were in fact prejudiced and those who were in fact the victims of prejudice to be officially designated as such; and any process by which it would be determined in which of the three groups an individual belonged—possibly some sort of testing by government psychologists—would surely be degrading, to say the least.) In addition, as was pointed out previously, classification as a "victim of prejudice" might very well be self-fulfilling prophecy.

It offends one's sense of fairness, too, that those who are the victims of prejudice and those who are neither prejudiced nor the victims of prejudice should have *their* rights to liberty and property restricted because of the prejudices of others. As argued above,

it is inconsistent with liberalism that any of these groups, including the prejudiced group, should be denied their rights as part of a program of moral and political education; but even if the right of the government to educate the prejudiced were to be acknowledged, there would still be no legitimate basis for the government to deprive those who have no prejudice and those who are only the victims of prejudice of their rights in order to put an end to prejudice. Since no program of integration can exist if the rights of the victims of prejudice cannot be restricted along with the rights of those who are prejudiced, integration can be achieved only at the expense of fairness.

Finally, programs of integration, even those which do not entail inequalities in the allocation of benefits, are really no different in principle from programs of segregation which adhere to the principle of "separate but equal." Indeed, the integrationist's principle really represents a variation of the "separate but equal" doctrine: integration is concerned with separating members of the same group while segregation is concerned with separating members of different groups and integrating members of the same group. Integration and segregation have the same effect on the individual, even where they do not deprive him of equal treatment, for they *both* deprive him, whatever his group membership, of liberty and property because of membership in an objectively irrelevant group²² (the objectively relevant groups being "the prejudiced," "the victims of prejudice," and those who are neither).

Of course, the motives of the proponent of compulsory integration are somewhat different from the motives of the segregationist. While the latter usually wishes to keep groups apart because he believes mixing is harmful or offensive or will lead to strife, the former wishes to bring them together to the fullest extent possible (as determined by their respective proportions in the population at large) in order to show them that such beliefs are mere prejudices and without foundation. But although the integrationist's intermediate goal is to eliminate prejudice, his ultimate goal, or at least the only goal which could justify use of the police power of the state, is no different from the goal of the segregationist—namely, social harmony. The restrictions on individual rights because of group membership might be only temporary under a policy of compulsory integration (since it is hoped that through the educative influences of integration prejudices will eventually disappear and good will among groups will exist naturally), but even such a tem-

22. See Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

porary restriction on individual rights because of group membership would be an unreasonable method of achieving social harmony. Moreover, many segregationists, too, justified segregation as a temporary policy, to be discontinued when the groups segregated were equal and could live together with mutual respect and amity.

In conclusion, programs designed to eradicate prejudice cannot justify the use of racial and ethnic criteria. Even if objectively relevant criteria are used in such programs, moreover, there remain serious objections to them, whether they violate the principle of equal benefits to equally deserving individuals or merely restrict the liberties of all persons equally.²³

E. Effectiveness and Harmony

One justification offered for some programs allocating benefits (usually jobs) and restricting freedoms on a racial or ethnic basis is that members of certain races and ethnic groups are more effective at certain jobs because of the persons with whom they have to deal in those jobs. Thus, a police department in a predominantly "black" city might hire only "black" policemen (an example of benefit allocation based on race), or it may hire policemen without regard to race but send its "black" policemen if available to the "black" neighborhoods (restriction of freedom within the job based on race).²⁴

23. It has been argued above that compulsory integration of adults for the purpose of ridding them of their prejudices violates certain principles of fairness and liberalism. Children, however, have somewhat fewer liberties than do adults, particularly with respect to paternalistic and attitude-shaping controls. Thus certain restrictions on liberty imposed by the state in order to influence moral and political ideas—restrictions which would be intolerable when applied to adults—may be acceptable when applied to children. For that reason, consideration of a child's group membership for the purpose of integrating schools with members of various groups might not be unfair or violative of the liberal ethic.

There are still obnoxious aspects to compulsory integration when applied to school children. The classification of children as potentially prejudiced or potentially the victim of prejudice may be a self-fulfilling prophecy, much like the classification of adults. It might cause children to emphasize rather than to de-emphasize certain distinctions among persons. Further, the problems of identifying the individuals as members of one group or another and classifying individuals who might be both victimized and prejudiced at different times, depending upon with whom they were dealing, would be no less difficult with children than with adults.

24. School admissions quotas for various races and ethnic groups are

Once again such a justification does not support the use of racial and ethnic criteria in decision-making. The group deserving of attention, if effectiveness is the concern, is defined as those individuals, regardless of race or ethnic group, who will be most effective in performing certain jobs. This definition does not in principle concern a racial or ethnic (ancestral) group, and there is no reason to suppose that it will in fact correspond with a racial or ethnic group for any conceivable job.

If the groups to be benefited or restricted are defined in a relevant, not a racial or ethnic, manner, there nonetheless remains the problem of how much the yardstick of "effectiveness in dealing with others" should be permitted to restrict a person's benefits and freedoms. If effectiveness is a product of the legitimate concerns of those with whom the person must deal, then it may be a proper criterion on which to hire or to assign him. For example, if people in poor neighborhoods want policemen (or lawyers) who have shared some of their experiences and who understand their problems and their language, and if satisfaction of this condition renders the policeman (or lawyer) more effective in the performance of his role, there is nothing objectionable in attempting to satisfy it. On the other hand, if the persons in the neighborhood want someone of a particular ancestry or of a particular skin color, regardless of or in addition to his understanding of local concerns, the desire is an irrational prejudice. Depriving someone of a *benefit* and giving it to another possibly less deserving because of the irrational prejudices of others is really little different from depriving him of the benefit because of the decision-maker's own irrational prejudices.²⁵ For example, some employers may refuse to hire "blacks" because of their own prejudices, whereas others may refuse to hire "blacks" because of the prejudices of their employees and the consequences that hiring a "black" would have for morale; in either case the effect of this action on the "black" individual is the denial of a job, the cause of it is prejudice, and by it the employer avoids harm (the reduction of his pleasure or his profit).

Where no one is hired or fired on the basis of the prejudices of the persons with whom he will have to deal, but persons are assigned to various posts on that basis—i.e., where no benefits are allocated based on prejudice but freedoms are restricted based thereon—the use of such a criterion in making assignments is still objec-

often sought to be justified on the ground of training more minority group members to serve the minority groups. The discussion in this section is applicable to such programs if based on that rationale.

25. See note 1, *supra* for a discussion of the problem of the relation of personal tastes in people to prejudices.

tionable. As was pointed out, restricting the freedom of all persons equally in fact treats unequally those who desire to exercise that freedom and those who do not so desire. Assigning "black" cops to "black" neighborhoods and "white" cops to "white" neighborhoods is no different from assigning "blacks" to certain drinking fountains or beaches and "whites" to others. The rationale given for the latter assignments, prevention of civil strife, is really no different from and surely no less important than the rationale given for former assignment, effectiveness.

To allow the rationales of effectiveness and social harmony to justify decisions allocating benefits and restricting freedoms on the basis of the prejudice of others is therefore as unjust as the prejudices themselves. Perhaps in extreme situations decisions can and should be made on such a basis, but even in those cases the individuals harmed thereby should be compensated.

F. Equal Education.

Programs of racial or ethnic "balancing" in public schools (*i.e.*, programs which require in each school certain percentages of members of particular racial or ethnic groups based upon the percentages of those groups in the entire school population) are often sought to be justified, especially by courts which order them instituted, as attempts to achieve equality of educational opportunity for all the students in the public schools, an equality required by the Equal Protection Clause of the Fourteenth Amendment. This argument for school integration should not be confused with that discussed earlier, namely, that aimed at the eradication of prejudices. The latter argument does not assert, as does the one presently under consideration, that the education received at racially or ethnically "unbalanced" schools is unequal from school to school. Rather, it asserts, at most, that even if individuals receive an equal education, the chances for equality of achievement among them *after* that education may be jeopardized by prejudices. It should be noted, too, that the attempted justification now under consideration does not rest upon any inequality of such objective facilities of racially or ethnically unbalanced schools as physical plant, equipment, books, quality of teachers and staff, teacher-student ratios, etc. Such inequalities of facilities would, if substantial, without doubt constitute a violation of equal protection, unless some rational

distinction in terms of desert or in terms of state obligation can be made between the children in one school and those in another. (It is beyond the scope of this article whether children can be distinguished in terms of educational benefits provided them by the government on the basis of how much their parents can or are willing to pay for their education.)

The argument for integration presently being discussed states that governments must provide, along with equal teachers, equal equipment, equal physical plants, equal texts, etc., relatively equal racial and ethnic mixes at each school (at least insofar as the percentages of *some* racial and ethnic groups are concerned). The implications of such a purported justification, if taken at face value, are thoroughly racist.

First, the argument, stripped to its essentials, states that members of particular ancestral groups (which will be designated here, for ease of reference, as "blacks" and "browns") will learn less well if they attend schools comprised primarily of other members of the same groups than they will if they attend schools which have a large number of members of other ancestral groups ("whites"), even when the schools are otherwise equal. (The argument also maintains, at least by implication, that "whites" benefit less from attending mixed schools than do "blacks" and "browns." If all groups benefited equally, then integration could never serve to *equalize* educational opportunity.) This argument contains within itself no principle limiting its applicability in time or place. "Brown" and "black" schools, therefore, will be everywhere and forever inferior to "white" schools, even if the "browns" and "blacks" are upperclass and the "whites" are lowerclass. Equal per-student expenditures being assumed, the schools in Washington, D.C. (where the "white" to "black-brown" ratio is low), will necessarily be inferior to those in Houston (where the ratio is higher), which will in turn be inferior to those in Fargo (where "whites" comprise the vast majority of the school population). School districts will be improved by enlargement and long-distance transportation of students if they thereby take in more "whites" but will be hurt by such measures if they thereby take in more "blacks" and "browns"; and "blacks" and "browns" will benefit from moving to areas with relatively few other "blacks" and "browns". The chief obstacle to the "black" or "brown" child, in short, will be another "black" or "brown" child sitting next to him in school, no matter how culturally advantaged the latter is and how disadvantaged "white" children might be.

A second reason why the argument is essentially racist is that it

must posit some genetic explanation for the fact that "blacks" and "browns" learn much better when mixed with "whites" but that "whites" do not improve by the same amount. While one's ancestry does influence his intelligence, ancestral groups which are as large as racial and ethnic groups supposedly include individuals of all levels of intelligence, and the idea of the intellectual superiority of *all* members of one racial or ethnic group to *all* members of another is absurd. Yet, the purported justification presently being considered implies just such a superiority of "whites." Moreover, to take into account intermarriage among "whites," "blacks," and "browns," the argument must assume that some qualitative genetic chasm lies between being, say, one-fourth "black" and one-eighth "black," or between some other percentages of "blackness," so that a person must for the sake of equality go to one school if he has the higher percentage of "blackness" and to another school if he has the lower percentage.

The argument for racial and ethnic balancing as a necessary precondition of equal education can rest, therefore, only on the ridiculous proposition of the genetic superiority of the "white" race. In recognition of that fact, many proponents of racial and ethnic "balancing" in the public schools have turned instead to the argument that certain racial and ethnic groups suffer educationally from segregation in the schools, not because those groups suffer from a genetic defect which renders them incapable of complete achievement in the absence of contact with other racial and ethnic groups, but because the segregation seems to them to be no different from discrimination historically directed against them on the basis of their ancestry and thus causes them to feel stigmatized.

In the assessment of this argument, it will be assumed that school officials, when assigning children to schools on the basis of, for example, their neighborhoods or intelligence, do not intend thereby to separate the children into any groups (racial, religious, eye-color, or otherwise) except those defined by neighborhoods or intelligence. In this situation there is clearly no actual intent to stigmatize any group, and one can infer at most a rather bizarre intent to stigmatize geographical or intelligence groups. One could only conclude that, if an individual feels stigmatized merely because one of the infinite groups of which he is a member (other than a group defined by geography or intelligence) is not proportionally represented in

each school and is proportionally overrepresented in his school, then that person has an irrational perception of his condition.

The proponent of racial and ethnic balancing would contend that, whether children's perceptions of their condition are rational or not, they must be accepted as a psychological and hence educational handicap which must be overcome in order to satisfy the duty of equal treatment. He would further contend that there are identifiable groups which suffer when they perceive an intent to segregate them from others, even if such a perception is erroneous. These groups will be ancestral groups in the sense that all persons who share the perception of segregation will be ancestrally related, though not all persons who share that ancestral relation will share the perception. The correlation between ancestry and the perception is not genetic but historical: persons of that ancestry during a historical period suffered widespread private and public discrimination and segregation because of their ancestry. This historical fact explains both the erroneous perception of present segregation and its connection with persons of particular ancestral groups. The explanation why some members of these ancestral groups do not feel stigmatized by overrepresentation in particular schools is that they understand the true basis on which they are assigned to school (e.g., geography); or they come from affluent or culturally advantaged families, have no feelings of inferiority, and would possibly resent having to go to school with less advantaged persons (e.g., poor "whites"); or they have a sense of personal worth of which even discrimination cannot deprive them.

There are several major difficulties with this argument for racial and ethnic balancing in the schools. In the first place, even if all persons who share this perception of stigma and are psychologically disadvantaged thereby belong to one ancestral group, it would not necessarily follow that this ancestral group is the one which should be proportionally distributed in order to eradicate the psychological difficulties. Each person who feels stigmatized may perceive a different group as the group to which he belongs and which is intentionally segregated, even though all the persons with such feelings are part of a single ancestral group and even though each one believes that his ancestry is the basis of his segregation. In other words, the group that the child perceives as an ancestral group may not be one and may not correspond with what any other child perceives as an ancestral group, even though all the children concerned are in fact part of one ancestral group. One "black" child, for example, might perceive only descendants of West Africans as intentionally segregated "blacks," while another perceives descendants

of West Africans and Arabs but not descendants of East Africans as "blacks," and yet another perceives descendants of West Africans and East Africans but not descendants of Arabs as "blacks." Similarly, among those Chinese children who suffer psychologically from apparent separation, one child might perceive the segregated group as consisting only of Chinese, while another perceives it as consisting of Japanese as well, another perceives it as consisting of Chinese, Japanese and Filipinos, but not Polynesians, and another perceives it as excluding Filipinos, but including Polynesians, and so on. Moreover, since the children will base judgments about others' ancestry on physical characteristics and not on data about the ancestry itself, the groups thought to be intentionally segregated will be numerous and varied, even though they may overlap considerably. To eradicate the psychological inequality caused by the erroneous perception of intentional separation will require, then, proportional distribution of all perceived-as-intentionally-segregated groups. Further, there being no groups other than geographical ones which are in fact intentionally kept segregated, the groups which are perceived as intentionally segregated cannot be ascertained without examining each child who has these erroneous perceptions.

In the second place, since the groups to be proportionally distributed will include many individuals who are not suffering psychologically because of supposed imbalance, there is a great risk that many of them will begin to suffer psychologically from being treated, with respect to school assignments, as "different" from others because of their ancestry or physical characteristics. Thus, a "black" child who does not perceive any stigma in going to his predominantly "black" neighborhood school may, when he is uprooted from that school because of his "blackness," begin to think of his "blackness" as an important (and perhaps shameful) aspect of himself since it is regarded as determinative of where he can go to school. New erroneous perceptions of stigma may arise as a result of the method used to eradicate old ones.

In the third place, it is extremely doubtful that all the children who perceive themselves as belonging to a group intentionally segregated from others come from one or a few ancestral groups. But even if this is the general case, is it true in all parts of the country, for all times, with never any exceptions or additional groups?

How can we determine when children of one group no longer view their overrepresentation in certain schools as intentional and as stigmatizing? How can we tell when children in certain groups *begin* to view as intentional their overrepresentation in certain schools? Must we test the perception of the children in each school district? How long will the results of our tests hold true? What community do we use as the standard for determining the proportions of each group?²⁶

Since it is posited that any overrepresentation of groups (other than geographically defined) is unintentional, and since there are an infinite number of groups to which an individual belongs and which could be perceived erroneously as having been intentionally segregated, basing a policy on the perceptions of segregation entails all of the problems suggested above and more. Perhaps the only way to avoid them would be to make each school into a microcosm of the community, with proportional representation of all groups therein. There are fatal difficulties with the microcosm approach, however. First, there are an infinite number of groups in any community, and the only way to represent all of them proportionally is to have only one school. The second difficulty, related to the first, is that there is no nonarbitrary way to define a community for purposes of proportional representation of all groups, short of including the entire state therein; even a neighborhood school is in the truest sense a microcosm of that neighborhood community, since it enrolls all the neighborhood's children (and hence all its "groups" in their exact proportions).²⁷

The argument that compulsory integration of schools is justified

26. Presumably, the boundaries of the community for purposes of determining the proportions of groups to be integrated will vary with each child who perceives an intentional segregation. Since by hypothesis none of the children concerned accept the neighborhood as a legitimate region for purposes of proportional representation, there is no assurance that the child's perception of the proper community will be an economically feasible, rational one. The only possible method for attempting to satisfy all the children who erroneously perceive intentional segregation is to pick, as the community to be integrated, the largest area in which integration of the relevant groups can proceed at a cost which does not eradicate the expected benefit of integration to the concerned children. (Here it must be assumed that we can measure the benefit which integration will produce, and that it will be the same for all of the children.) Even this approach to determining community boundaries may not satisfy all concerned children. Ironically, some children may find a larger proportion of their group in their new school than in the old one, if their perception that they were overrepresented was based on a smaller relevant community or perhaps on a mistake regarding proportions in that community.

27. The problems of community size for purposes of determining a microcosm are identical with the problems mentioned in note 26, *supra*.

because of erroneous perceptions of intentional segregation is also objectionable on principle in that it would compel expenditures of money to compensate for psychological difficulties caused by erroneous and unjustified beliefs. If school officials are truly using rational, non-invidious criteria for assigning children to schools, must they compensate for mental anguish those who do not believe their criteria are non-invidious at the educational expense of the other children? (It is assumed that there are costs, either in money or in some educational advantage, to integrating schools; this assumption is implicit in the hypothesis that the original school assignments were rational.) While one cannot make moral judgments about children's perceptions of reality, one can legitimately ask why erroneous perceptions such as those of intentional segregation are any more worthy of compensation than the multitude of other non-hereditary obstacles to education, such as poverty, lack of educational attainments of one's parents, lack of variety in vocational models in one's family or neighborhood, and so forth.²⁸ The answer is, in short, that erroneous perceptions of intentional segregation are *not* more worthy of compensation than are those other non-hereditary obstacles to education faced by certain children and indeed are probably *less* worthy.

In any event, it is doubtful that erroneous perceptions of intentional segregation constitute a real educational obstacle or that they even, in fact, exist. Evidence, such as that presented in *Brown v. Board of Education*, 347 U.S. 483 (1954), gathered at a time when segregation of certain groups *was* intentional and any feelings of being stigmatized were based on fact, is not relevant to situations of *de facto* segregation. It is even questionable whether the educational harm found in *Brown* to be a product of *de jure* racial segregation was actually related to perceptions of being stigmatized, rather than to disparities in wealth, educational attainments of parents, etc., as well as differences in school facilities. (See *infra*, pp. 243-44 and p. 248 for discussion of what should have been the basis for declaring racial segregation in schools unconstitutional.) But whatever validity the argument of educational inequality

28. Would a state, for example, have to spend all its education budget curing psychological problems before it could spend a penny on those with no psychological problems? Could it allow its entire budget to be drained by problems caused by erroneous perceptions of what it was doing?

due to stigmatization had in the context of de jure racial segregation, it is highly unlikely in a context of good-faith de facto segregation that inequalities among schools with racial, ethnic, or any other imbalances are due to subjective perceptions of stigmatization rather than to poverty and similar objective factors.

The conclusion one must reach with respect to programs proportionally distributing certain groups throughout the schools in order to give children as much of an equal chance educationally as is possible is that the groups to be so distributed will not for all places and times be races or ethnic groups (unless one believes in the theory that certain "races" or "ethnic groups" have a genetic defect which renders them incapable of full achievement unless they have contact with other racial or ethnic groups). One must also conclude that the groups to be distributed will not be those erroneously perceived as intentionally segregated and, even if this criterion is used, the groups will not in *principle* correspond to racial or ethnic groups because ancestry is not a defining element of them. (Whether they will in *fact* correspond to ancestral groups is hard to assess, since the very existence of perceptions of stigmatization in the context of de facto segregation is open to serious doubt.) If one wishes to equalize educational opportunities beyond providing equal facilities, all the evidence which has been presented thus far, including evidence relating to racial integration, suggests that equalization is accomplished by integration of diverse socio-economic classes without regard to ancestry, not by integration of races or ethnic groups or groups perceived as such.

G. *Proportional Representation*

The use of racial and ethnic criteria both in programs restricting freedoms and those dispensing benefits has sometimes been defended on the ground that racial and ethnic groups should be represented in schools, jobs, etc., in the same proportions as they are represented in the overall population, for no reason other than proportional representation for its own sake. This argument has been thoroughly dealt with above. (See discussion accompanying notes 4-6 *supra*.)

H. *Administrative Convenience*

One final proposed justification for programs allocating benefits and burdens and restricting freedoms on the basis of racial and ethnic criteria proceeds as follows: while one's racial or ethnic group membership can never itself be the basis of one's entitlement, nonetheless, it can be such strong evidence for or against

one's membership in the class of persons objectively entitled, and the cost of obtaining better evidence can be so great, that racial or ethnic group membership should establish in some cases a conclusive presumption of entitlement or nonentitlement.

This argument must be rejected. In the first place, without definitions of races and ethnic groups it can never be administratively convenient to use membership therein as a basis of entitlement; and it has been shown that races and ethnic groups have no accepted definitions—at least none which will result in ease of administration. In the second place, an involuntary status such as one's ancestry, sex, physical appearance, etc., should never *conclusively* determine a person's rights if such status is not itself an objectively entitling factor. (With respect to sex, for example, which presents no problems of definition, unless it is objectively relevant in itself, its use as a conclusive determinant of rights is illegitimate regardless of its high correlation with objectively relevant criteria, *i.e.*, regardless of the administrative convenience of thus using it.²⁹)

Although involuntarily acquired characteristics should never conclusively determine one's rights where they merely have a high correlation with but are not identical to criteria objectively relevant to entitlement, there is no reason why they cannot be used by decision-makers as *evidence* of the existence or nonexistence of objectively relevant criteria. Whether they should in themselves be *sufficient* evidence would depend in part upon the probabilities of the existence or nonexistence of objective entitlement established by such evidence. It would also depend upon the value of the benefit or weight of the burden being distributed and upon the cost of obtaining and reviewing additional evidence, as well as the relative ease of each party's obtaining such additional evidence. Still another consideration would be whether the decision-maker is attempting to predict something about the individual's *natural* characteristics or something about the kinds of *choices* he will make. Although we may not regard it as unfair to use certain characteristics, not themselves relevant to the purpose of the decision, as sufficient evidence of a natural characteristic we are trying to predict (e.g., to use an individual's membership in a certain ancestral group

29. For arguments to this effect, see Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 891 (1971).

as evidence that the individual is susceptible to a certain disease and therefore should be required to undergo vaccination against that disease), we are reluctant to use such characteristics as evidence that he will make certain choices or behave in a certain way (e.g., to use "blackness" to predict propensity toward violent crime, "whiteness" to predict anti-"black" prejudice, sex to predict job loyalty, or age to predict drug use); and we feel differently about these two situations even when the weight of the evidence, in terms of purely statistical probabilities, is the same for both.

It is doubtful that ancestry and physical characteristics indicative thereof could ever be *sufficient* evidence of entitlement under any of the programs discussed previously in this article which were deemed to be justifiable programs. Such programs were those to compensate victims and the descendants of victims of past, illegal governmental and private discrimination to the extent of the loss caused by such discrimination, and those to benefit economically and educationally disadvantaged persons. Ancestry and physical characteristics (other than physical handicaps) would be almost totally irrelevant to the latter programs; and, while they would be better evidence of entitlement under the former programs, they would not conclusively prove entitlement nor would they have any probative value on the issue of damages. With respect to programs of school integration to avoid erroneous perceptions of ancestral stigmatization, evidence thus far amassed of educational performance indicates or at least is consistent with the hypothesis that poor self-image is more likely related to the affluence, educational and vocational attainments, etc., of parents and neighbors than to a misunderstanding of the intent behind assigning children to neighborhood schools or to schools on some basis other than ancestry.

IV. RACIAL AND ETHNIC CRITERIA AND THE LAW

This section presents the authors' position as to how the Fourteenth Amendment and the Civil Rights Act of 1964 *should* be interpreted, not how they *have in fact been* interpreted. Authorities inconsistent with the theses stated herein will not, therefore, disprove them.

A. *The Fourteenth Amendment*

The two principal clauses of the Fourteenth Amendment—the Due Process clause and the Equal Protection clause—embody, with respect to the use of group membership criteria in decision-making, the principles which have been advocated throughout this article.

First, it is a denial of *due process* to deprive a person of liberty (or life or property) because of his group membership when such membership is objectively irrelevant to any legitimate reason for depriving him of liberty (or life or property); second, it is violative of *equal protection* to distribute different benefits or burdens to different individuals for reasons of their group membership when such membership does not relate rationally to the individuals' entitlement to those benefits or burdens.

To understand how the Equal Protection and Due Process clauses complement each other with respect to the use of group membership criteria in decision-making, one must bear in mind that there are two basic types of decisions in which use of group membership criteria occurs: (a) there are those decisions whose object is to allocate benefits or burdens among individuals—here, the questions raised are those of equal treatment and hence equal protection of the laws; and (b) there are those decisions whose object is to separate or integrate individuals who have been treated equally—here, the question raised is one of a denial of liberty and property without due process of law. Examples of decision type (a) are those which give preferences to members of objectively irrelevant groups (such as giving the vote only to “whites” in Mississippi) or those which achieve the same result by allocating benefits in pro rata proportions among objectively irrelevant groups (such as those allocating jobs or funds between “blacks” and “whites” in fixed proportions—i.e., quotas—different from those proportions which would result if individuals were selected solely on their merit, need, or other relevant factors). Examples of decision type (b) are those requiring separation or integration of members of groups because of their group membership, such as those requiring racially segregated or integrated housing and schools, or racially separate drinking fountains, restrooms, railroad cars, or lunch counters; it is the compulsory separation or integration of the members of the groups and not unequal treatment of them which is of concern in this type of decision.

Of course, the concepts of due process and equal protection are interrelated. As has been pointed out, laws mandating compulsory separation or integration, although applicable to everyone, nonetheless treat unequally those who value differently the liberties taken away by such laws. Thus, laws restricting the freedom to

associate, to buy a home, to go to the school of one's choice, and so on, when based on group membership criteria objectively irrelevant to any legitimate policy, are, in one sense, denials of equal protection to those persons who value the freedoms more highly than do others. Conversely, laws distributing benefits and burdens on the basis of irrelevant group membership criteria not only deny members of some groups equal protection but also deprive them of liberty or property for irrational reasons and, hence, deny them due process. However, although all denials of due process are denials of equal protection and vice versa, the two clauses should be viewed as applicable to different types of laws: the Due Process clause to laws which on their face restrict everyone equally; the Equal Protection clause to laws or official acts which on their face treat different persons unequally.

While there is no unassailable formula for assessing the legitimacy of a governmental policy and the classifications used to achieve it, there are some relevant principles which seem well established in this society's ethical and legal systems. Policies of imposing corporate responsibility for governmental actions and inactions in the past, for example, to the extent that the individuals burdened thereby were not personally implicated in the governmental actions and inactions and presently derive no benefit from them, are always unjust and become intolerably so if made applicable to events too far in the past. (See discussion, accompanying note 14 *supra* and pp. 214-15). Similarly, policies which attempt to hold persons liable retroactively for acts of discrimination which were legal at the time they occurred offend basic principles of fairness if the acts of discrimination were not those depriving someone of property or forcing him to labor, but merely those refusing to hire him or sell him property or otherwise allow him to enjoy another's property. (See discussion, pp. 209-10 *supra*.) Policies which attempt to anticipate future discrimination, or which deprive persons of benefits or freedoms to which they are objectively entitled in order to produce some future state of affairs, or which deprive persons of benefits or freedoms because of the prejudices of the decision-maker or those with whom he must deal are all illegitimate. (See discussion, pp. 219-20 accompanying note 21-23, and pp. 228-29 *supra*.) When the policies are legitimate the classifications used to accomplish them still may not be if they are too over- or under-inclusive with respect to the goals sought. (See note 3 *supra*.) Hardly any policy whatever could be implemented if the legislature or administrators of the policy had to establish tests which insured one hundred per cent accuracy in determining who deserved benefits, burdens, or restrictions under the policy. How-

ever, while *all* tests will thus be too over- and under-inclusive if measured by the standard of omniscience, the constitutional standard must be realistic.

The constitutional toleration of over- and under-inclusiveness in classification should be a function of the ease with which an individual can change his classification, the cost of administering a more exact classification, whether the classification is used to predict the probability of choices or of natural events, and the importance of the benefit or restriction, as well as accuracy of the classification in measuring the factors objectively relevant as determined by the policy. Thus, if the evidence for determining whether or not an individual qualifies for a benefit or restriction is a fact about him which is relatively easy for him to change, then the evidence can be given a great deal of weight or even made conclusive. On the other hand, if the evidence consists of some fact about the individual which is impossible for him to change (*e.g.*, ancestry, sex, physical characteristics) or possible for him to change only at great sacrifice (*e.g.*, his religious and political beliefs, his place of residence), it should never be given conclusive weight (unless it is objectively conclusive, like being male and unable to give birth to children). How much weight it should be given might depend upon whether it was being used to predict future choices and how costly it was to obtain more or better evidence. (See discussion, pp. 237-38 *supra*.)³⁰

Finally, if a classification is not defined or definable, such as a racial or ethnic classification, so that its administration is without standards, it is a classification offensive to the concepts of due process and equal protection. (See discussion, p. 203 and *Perez v. Sharp*, 32 Cal. 2d 711, 728-732 *supra*.)

At this point some of the authorities will be discussed in order further to illustrate the operation of the Equal Protection and Due Process clauses. It must be re-emphasized, however, that whether or not the authorities establish the interpretations given the clauses

30. Most classifications with which we are familiar (*e.g.*, the use of bar exam results as conclusive evidence of intellectual ability to practice law) fall somewhere in the middle with respect to the elements of the formula. (Thus, the bar exam results, for example, can theoretically be changed, but with some difficulty, by one who is objectively qualified; a better test can be devised, but at a higher cost; the benefit at stake, while important, is not the most important benefit that can be allocated; and the test is fairly accurate at measuring objective entitlement.)

above as the authoritative ones is not the point in issue; what is in issue is how the clauses *should* be interpreted.

1. *The Equal Protection Clause.*

The Equal Protection clause is violated any time individuals who are otherwise entitled to equal benefits or other equal treatment are treated unequally because of their membership in groups, whether the groups be racial, national, religious, sexual, political, fraternal, eye-color, etc., so long as such membership is objectively irrelevant to their entitlement and not justified under the formulas of administrative convenience discussed above. Thus, the Equal Protection clause is an expression of what we have called the standard of *individual equality*, the standard of justice. It proscribes denials of equal protection of the laws to "any person." (Emphasis added.) Not only does it condemn overt preferences for members of one group over members of another group when such groups are so constituted that membership therein is irrelevant to entitlement,³¹ but it also condemns conscious attempts to achieve proportional equality among groups, when group membership is objectively irrelevant to entitlement.³² "White" supremacy, "benign" discrimination in favor of "blacks," Jewish quotas in medical schools: all run afoul of the standard of individual equality and hence, if the state is implicated, the standard established by the Equal Protection clause of the Fourteenth Amendment.

All of the judicial decisions interpreting the Equal Protection clause have given it this reading. While they have occasionally been in conflict as to when membership in particular groups is relevant or irrelevant to entitlement for particular benefits (*i.e.*, as to when individuals are objectively equal in entitlement) and as to

31. See, for example, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954).

32. See, for example, *Banks v. Housing Authority of San Francisco*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954), and *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954), for cases overturning the allocation of benefits on a quota basis. In *Banks* the court said, "The question presented is primarily one of equality of treatment of the 'persons' affected. The Constitution speaks of the individual, not of the racial or other group to which he may belong. It prohibits a state from arbitrarily discriminating against 'any person.' . . . The arbitrary character of . . . [the quota] method of selection is too obvious to require elaboration. It bears no relation to the eligibility of the individual. It cuts across and disregards every element which conceivably has any bearing upon the eligibility of the individual. It is really an arbitrary method of exclusion, a guaranty of inequality of treatment of eligible 'persons.'" (120 Cal. App. 2d at 8-9, 260 P.2d at 673.)

how much discretion is vested in the legislative and executive branches in making such determinations, no decision that the authors have been able to discover has departed from this general interpretation of the Equal Protection clause.

2. *The Due Process Clause.*

Unlike cases dealing with the legality of using nonracial group membership criteria in decision-making, most cases involving the use of racial criteria have conceptually, if not expressly, been concerned with due process, not equal protection. The reason for this difference is that, while members of many kinds of groups have been denied equal benefits through overt discrimination or through the subtler discrimination of quota systems, "races" are the only groups which have by law in several states been given public benefits as groups on an *equal* but *separate* basis (although other kinds of groups, most notably in the area of residential and apartment housing, have suffered from private segregation). Thus "blacks" and "whites" have through state action been given public school facilities, housing facilities, residential zones, public parks, busses, golf courses, restrooms and water fountains, railroad cars, etc., which were equal in all respects but which could not be occupied or used by members of the other race. Sometimes the benefits received by the "blacks" were even superior to those received by the "whites," so that the "blacks" surely could not claim a denial of equal protection. Nonetheless, the restriction of liberty on the basis of race which the separate but equal doctrine entailed has caused courts to hold that it is violative of due process of law.

Not all of the cases invalidating provision of separate but equal facilities under the Fourteenth Amendment have been clear as to which clause of that Amendment they were invoking, nor have all of the cases which *were* clear on this point been based on the proper clause. In *Brown v. Board of Education*, 347 U.S. 483 (1954) *supra*, the Supreme Court treated legally compelled school segregation as an equal protection problem. The argument was that legally compelled separation stigmatized the minority children, which in turn led to difficulties in learning for them, which in turn meant that the *apparent* equality of educational benefits being provided was not a *real* equality. Thus, in the case of education, the *stigma* attached to the segregation affected the *benefit*. The equal

protection argument in *Brown* is strained and, in any event, was unnecessary, for the very same day, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court held that racial segregation in public schools violated due process without regard to whether "blacks" received inferior education because race had no rational connection to any legitimate purpose in making school assignments. Furthermore, regardless of the situation within the realm of education, elsewhere there *can* be separate but equal benefits, for some benefits (such as lunch counters and restrooms) are of the type which may be objectively equal and which may not be depreciated by stigmas; in these cases, where everyone is in fact equally benefited or burdened, the proper rationale for holding that denials of life, liberty, and property based on racial group membership violate the Fourteenth Amendment has to be that such denials violate due process. In *Buchanan v. Warley*, 245 U.S. 60 (1917), and *Harmon v. Tyler*, 273 U.S. 668 (1927), then, the Supreme Court held that laws requiring separate residential areas for the races violated the Due Process clause. There was no showing that the "black" residential areas were inferior to those of the "whites" or vice versa.³³ In *Watson v. Memphis*, 373 U.S. 526 (1964), the Supreme Court repudiated the separate but equal doctrine as applied to parks: "The sufficiency of Negro facilities is beside the point; it is the segregation by race that is unconstitutional." (373 U.S. at 538.) In *Dawson v. Mayor and City Council of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955), the court held that operation of segregated public beach and bath house facilities violated the Due Process clause. Again, there was no showing that the facilities of the "blacks" were inferior to those of the "whites" or vice versa. In *Turner v. City of Memphis*, 369 U.S. 350 (1962) [segregated busses], and *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) *aff'd*, 352 U.S. 903 (1956) [segregated restaurant facilities], there were holdings of unconstitutionality under the Fourteenth Amendment without specification of clause; because there was no finding of unequal facilities, it is most reasonable to infer that the practices ran afoul of the Due Process not the Equal Protection clause. (See also *Loving v. Virginia*, 388 U.S. 1 (1968) [miscegenation laws].)

(It should be noted that the uniqueness which the law attaches to land does not require a finding that separate residential areas or housing units or beaches violate equal protection; for while the land assigned to each individual or race and to which he or they are restricted might be unique, such uniqueness merely makes the

33. See also *Taylor v. Leonard*, 30 N.J. Super. 116, 103 A.2d 632 (1954) *supra*.

land *irreplaceable* and does not make it *unequal* to the land of the other individuals or races. In the above cases, it is entirely possible that the "blacks" had been assigned superior land, houses, or beaches. In any event, the proposition that the Due Process clause is the one primarily involved in segregation cases is amply supported by such examples as lunch counters, busses, restrooms, or drinking fountains—since there is little doubt that these facilities can be made equal enough to satisfy the Equal Protection clause—and by such other examples as antimiscegenation laws—since these by their very nature do not burden one race more than another. Of course, as has been pointed out, every denial of due process results in an inequality between those who do and those who do not value the liberty which is restricted. Thus, those who wish to intermarry are burdened more by antimiscegenation laws than others. But unless all denials of due process are treated as denials of equal protection [and all denials of equal protection treated as denials of due process, since denials of equal protection restrict liberty and property for arbitrary reasons], the Equal Protection clause should be restricted to laws which on their face treat different classes of persons differently in terms of benefits or burdens.)

It is important that the courts have not said that due process is violated only when the separation of the races (or other groups) occurs because of the *majority group's* prejudices. Had the segregation laws been passed by a majority composed mainly of "blacks," along with some "whites" who were either prejudiced or sympathetic to the "blacks'" desire for segregation, the courts, according to the rationale which they have given for their decisions, would and should still hold the "separate but equal" laws to be violative of due process in that under such laws those unprejudiced "blacks" and "whites" not desiring segregation would be deprived of liberty and property for the irrational reason of their race. The courts in overturning laws compelling segregation have not made findings as to the motives behind the segregation or as to the racial composition of the majority that passed the laws or wanted such laws passed. Nor have the courts said that only the "blacks" were denied due process by segregation. The courts have not limited their relief to allowing "blacks" to use "white" facilities but not the reverse. The fact that, presumably, "whites" would have standing to attack the segregation laws would mean that their rights, too, had been vio-

lated by enforced segregation; yet the laws could not have been directed against both "blacks" and "whites." Which race the laws were in fact directed against, whether they were directed against any race or instead motivated by mutual respect, whether the laws were favored by a majority of one race, of the other race, or of both races: these questions are not relevant and have not been deemed relevant to the determination that "separate but equal" laws violate due process.

When it is said that legally compelled segregation because of race or ethnic group membership deprives persons of liberty and property without due process of law because such group membership provides no rational basis for such deprivations, it is not being said that there is no conceivable *reason* for such segregation. The most obvious reason is the one which in fact has been given as a justification by the states practicing such legal segregation, namely, the preservation of civil peace and harmony. The argument has been that, although the state had no legitimate interest in persons' prejudices per se, it did have an interest in seeing that those prejudices did not cause civil strife; compulsory segregation was rationally related to that end. Rejecting this argument, the courts have invoked that corollary to the general principle of due process which requires that state-imposed restrictions upon life, liberty, and property must be reasonable in form as well as purpose, *i.e.*, that in pursuing even a legitimate goal a state may not elect methods severely restrictive of these rights when reasonable and substantially less restrictive alternatives are available. Those states which feared strife and violence if the races were allowed to mingle had at their command such weapons as the power to prohibit and punish breaches of civil order and peace—a method of control which aimed directly at the evils sought to be avoided without affecting the liberty of either "blacks" or "whites" to associate with individuals of their choice. Segregation of the races, on the other hand, was a blunt instrument of control which not only severely limited such liberty but also aimed only indirectly and erratically at the feared evils and could, indeed, by institutionalizing through law the racial prejudices which were the source of the evils, actually perpetuate them. The use of segregation also was subject to the objection that it is basically unfair to restrict someone's rights because of another's prejudices. (See discussion, pp. 228-29 *supra*.) As the Court in *Buchanan v. Warley*, *supra*, stated: "That there exists a serious and difficult problem arising from a feeling of race hostility . . . may be freely admitted. But its solution cannot be promoted by depriving citizens of their

constitutional rights and privileges." (245 U.S. at 80-81.)³⁴ In other words, racial or other group prejudices are not a legitimate basis for denying life, liberty, or property.

As has been pointed out herein (see discussion accompanying notes 21-23 and pp. 228-29 *supra*), programs of racial or ethnic group *integration* designed to eradicate prejudices or programs assigning persons to jobs, schools, or neighborhoods, for example, on the basis of the prejudices of those with whom they must deal share the unfairness of programs of *segregation* based on prejudice and, therefore, violate the Due Process clause.

3. *Racial Integration of Schools and the Fourteenth Amendment*

Legally compelled racial or ethnic integration of public schools would violate the Due Process clause if the races or ethnic groups were left undefined in the law or court order. (See discussions p. 203 and p. 241 *supra*.)

There are no legitimate policies which would support compulsory integration of ancestral groups (see discussions accompanying notes 21-23 and pp. 230-31 *supra*); therefore, laws or court orders requiring integration of ancestral groups would constitute arbitrary restrictions on liberty and violate due process.³⁵

The policies of eradicating prejudice and overcoming the educational obstacles of erroneously perceived stigmatization, if legitimate, do not justify integration of ancestral groups. The relevant groups for such policies are, on the one hand, those individuals who are prejudiced and those against whom they are prejudiced and, on the other hand, those who erroneously perceive intentional segregation and stigmatization and the group to which they belong and which they identify as being segregated. (See dis-

34. See also *Watson v. Memphis*, 373 U.S. 535, *supra*, for the proposition that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."

35. Simply because a person may not have absolute freedom to choose his child's school does not mean that assignment of the child by a school board, for example, by use of arbitrary standards of assignment is not an unjust infringement of liberty. Even if a thousand non-arbitrary standards could have justified the identical school assignment, the fact that an arbitrary standard was used vitiates it. A violation of due process does not require, in order to be proved, the assertion of an inviolable freedom; all that it requires is an *arbitrary* restriction of that freedom.

cussions, pp. 221-22 and pp. 231-33 *supra*.) Physical characteristics and ancestry might be relevant and even sufficient evidence of membership in some of these groups. (See discussion, p. 238 *supra*.) However, the former policy has dangers of perpetuating prejudices (see note 23 *supra*), and the latter policy has a dubious empirical basis in terms of whether children do misinterpret de facto segregation. (See discussion, pp. 235-36 *supra*.)

In view of the inferior rights of children and on the premise that the government can properly act as their educator, the above policies would be consonant with due process so long as their classifications were not racial or ethnic but objectively relevant, along with the evidence used to classify.

It is true, of course, that if the equal protection clause demanded racial and ethnic integration, then such integration would be consonant with due process. Racial and ethnic integration, however, are not required by the Equal Protection clause, and to argue that they are is to imply genetic inferiority (assuming a concept of races and ethnic groups resembling that in common usage). (See discussion, pp. 230-31 *supra*.) *Brown v. Board of Education*, 374 U.S. 483 (1954) *supra*, could have outlawed legal segregation on due process grounds as an arbitrary restriction on liberty, as did *Bolling v. Sharpe*, *supra*. The argument that "black" schools are inherently inferior cannot be taken out of the context of psychological stigmatization as discussed in *Brown* without being absurdly racist, and the psychological stigmatization found in *Brown* cannot be taken out of the context of de jure segregation, at least as applicable to an entire race, everywhere and forever. Psychological stigmatization was probably not even the basis of the disparity in performance of "blacks" and "whites" that the evidence in *Brown* showed. The most probable explanation of the evidence was inequality of wealth, parental vocational and educational achievements, and some inequality of facilities. Furthermore, when segregation is de facto, psychological stigmatization resulting from the perception of segregation is even more suspect as an explanation of educational performance. In any event it is clear that without de jure segregation of races, the class of psychologically stigmatized and race will not necessarily be co-extensive at all times and places.

Brown, therefore, does not justify and should not be read to compel racial integration, even if one were to assume that race could be defined for purposes of integration in a manner that retained the key element of an ancestral group. (Without a definition of race, integration would violate due process and could not be shown to be required for equal protection.) The United States Supreme

Court has apparently misinterpreted *Brown* because it has endorsed compulsory racial integration as a remedy for compulsory racial segregation.³⁶ The harm in *Brown* was *not* racial segregation, but the fact that racial segregation was compelled by law. That harm is primarily a due process harm, not an equal protection one (except in the sense that all denials of liberty fall more heavily on those who value the liberty). While there may also have been an equal protection harm in *Brown* because of its de jure segregation context and the possibility of stigma, that harm, as well as the violation of due process, ceases, at least as being co-extensive with race (if it ever was), when the de jure segregation ceases. Thus, while the schools for many reasons might remain just as segregated after de jure segregation ceases, this does not mean that the harm inflicted by de jure segregation remains; for that harm was the assignment to schools on the basis of race. It is the failure to understand due process harms and the fact that, of two policies whose results are identical in terms of racial makeup of schools (or housing, etc.), one can be constitutional although the other, because it is based on an arbitrary standard such as race, is not, that has led the Supreme Court to support compulsory integration plans in the South, despite the lack of racial definitions, the logical implications of "white" genetic superiority, and the clear language of the 1964 Civil Rights Act forbidding compulsory integration.³⁷

The existence of an equal protection duty to integrate schools racially does not depend on the *cause* of de facto segregation. Even if residential areas, for example, were racially segregated by law and residential segregation were the cause of segregated schools, there would be no constitutional harm in the residential segregation itself but only in the fact that the residential segregation was legally compelled (a due process harm). Removing the legal compulsion might not change the racial complexion of either the residential area or the schools at all; yet the constitutional wrong will have been eliminated. A fortiori, when residential segregation results from private discrimination or is totally voluntary, it cannot create a constitutional duty to remedy either it or its reflection in the schools.

36. See *Green v. New Kent County School Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *McDaniel v. Barresi*, 402 U.S. 39 (1971).

37. See *McDaniel v. Barresi*, 402 U.S. 39 (1971) *supra*.

(The argument that because a school board has the power to assign students on many bases, each of which will produce a different amount of racial integration, when the school board chooses a basis of assignment that produces little integration it has therefore segregated de jure, is an attempt to prove a duty [to integrate] by assuming it.)

In essence, therefore, no one has a right to a racially integrated education (or neighborhood) under the Equal Protection clause. All one has is a right not to be assigned to a school (or a neighborhood) on the basis of race. It follows from this argument, then, that racial segregation not imposed by law is not unconstitutional. Nor is there any reason to distinguish the South from the North in this respect; the fact that the South formerly segregated de jure is irrelevant to the duty affirmatively to integrate, even if its cessation of de jure segregation did not end de facto segregation.³⁸ The Southern school districts should not even be required to integrate to show good faith cessation of de jure segregation; the test of good faith will come when someone changes neighborhoods, and until then no one is being harmed by the racial segregation per se. Finally, the irrelevance of de facto racial segregation to equality should be obvious to all who reject notions of racial superiority and inferiority.

If racial integration is not required by the Equal Protection clause, then it is, as has been shown, violative of the Due Process clause (and, as will be shown, the 1964 Civil Rights Act).

4. *Integration of Nonracial Groups in Schools and the Fourteenth Amendment*

Although the subject is somewhat beyond the scope of this article, a word should be said about the constitutionality of de facto segregation, not of ancestral groups, but of other groups, such as the rich and poor, whose integration in schools might bring about more nearly equal educational performance of those of potentially equal ability.

Integration involving a group to which belong individuals who erroneously perceive the group as having been intentionally segregated and stigmatized and the relation of such integration to equality have been discussed previously. (See discussion, pp. 231-36

38. This argument has been propounded by other commentators as well, although sometimes for quite different purposes. See, for example, Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697 (1971).

supra.) If such groups do exist and if the educational performance of some of their members suffers because of their erroneous perception of intentional segregation, integration of such groups would promote equality of performance of those with equal inherited ability.

However, there is surely no reason to favor those who suffer educationally (and hence do not perform equally with those of equal inherited ability) because of erroneous perception of segregation and stigma over those who suffer educationally because of their poverty and the limited educational and vocational achievements of their parents. It is the latter, indeed, whose problems are not caused by their own error in perception, that should be given higher priority in attempts to make education more nearly equal. (See discussion accompanying note 28 *supra.*) Likewise, there is no reason to prefer those whose performance is affected by erroneous perceptions to those whose performance is affected by other psychological factors, including psychological disorders. There is no reason ethically, moreover, to prefer those of equal inherited ability but unequal environments to those of unequal inherited ability (to the extent that they can benefit from remedial educational programs), since a person is no less deserving when his handicap is genetic than when it is environmental.

It is the opinion of the authors (although, again, it is in no way central to the thesis of this article) that the Equal Protection clause does not require the state to do more than provide equal facilities (equal teachers, books, equipment, and the like). (Even this duty might not be absolute, and it is arguable that the state might constitutionally dispense education based on ability to pay.) Once the state is charged with the duty of remedying obstacles to equal performance such as erroneous perceptions, home environment, wealth and even heredity, there is no logical point at which the duty stops short of having all resources spent on the least intelligent to the extent they can be benefited before any resources are spent on the more intelligent. The fact that the state is, through its laws governing the economy, the distribution of wealth, marriage, and the right to procreate—indeed, through all its laws—implicated in the educational inequalities cannot be a source of any duty to equalize education if these laws are constitutionally just; and if these laws are constitutionally unjust, it is

they which the state has a constitutional duty to change, not the laws in those areas, such as education, which are affected by injustice in other areas of the law.

Moreover, making the equalization of educational performance a constitutional mandate would transform the functions of courts into those of legislatures and school boards, determining the size and location of school districts; weighing the cost of attaining equality in education against the loss of other benefits which spending for equality occasions; constantly re-examining school programs in the light of demographic shifts, changing mores, rising or falling wealth, and similar factors; and compelling taxpayers to raise revenue (and perhaps dictating the type of taxes and rates to be imposed).

Attempts by governments to equalize educational opportunities are *permitted* by the Due Process clause so long as classifications relevant to equality (which do not include racial or ethnic classifications) are used. However, beyond a certain point such equalization is *not compelled* by the Equal Protection clause, and beyond this point arguments for more educational equality should be addressed to legislatures and school boards, not to courts.

B. *The 1964 Civil Rights Act*

The 1964 Civil Rights Act embodies the principles of justice which state that it is a denial of due process to restrict an individual's freedom and a denial of equality to deprive him of a benefit to which he is objectively entitled because of his membership in a group when such membership has no rational connection to his right to freedom or his entitlement to the benefit. The Act is not a full restatement of these principles because its scope is limited to certain specific benefits (employment, public facilities and accommodations, federal programs, education, etc.) and to certain specific freedoms (attendance at school of choice, etc.) and because it protects such benefits and freedoms against consideration of only a limited number of rationally irrelevant types of group membership (viz., race, color, religion, sex, and national origin). But within this limited scope the Act is virtually synonymous with the principles with which we are concerned.³⁹

39. The Supreme Court decided in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *supra*, that employment tests which measure factors unrelated to job aptitude, resulting in the failure of a higher percentage of qualified "blacks" (not defined) than qualified "whites" to secure employment, violate the 1964 Civil Rights Act, *even without a showing of discriminatory motive*. This holding is illogical. The real group which is the

Because of some confusion as to the purpose of the Act,⁴⁰ it is important to stress that, regardless of what *examples* members of Congress may have had in mind (such as discriminatory practices by "whites" against "blacks") when they passed it, the Act as written confers benefits on individuals, not on specific groups. Thus a "white" would be protected under the Act from discrimination by "blacks" based on his "whiteness" and from discrimination by "whites" who erroneously believe that he is a "black" based on his supposed "blackness" (and even from discrimination by "whites" who are "benignly" favoring "blacks"). Only the *reason* for the discrimination (e.g., race, sex, etc.), and not the group to which the victim of the discrimination belongs, is relevant under the Act; and membership in *any* racial, color, religious, national, or sexual group is an invalid reason for decision-making regarding benefits and freedoms thereunder.

Of course, to be completely consistent with the requirements of due process and equality the Act would have to provide for possible exceptions from its operation in cases where race, color, re-

subject of the unfair discrimination in testing is "those individuals, *regardless of ancestry (or national origin, religion, sex, etc.)*, who are qualified to hold the employment tested for but are unable to pass the test." Within such a group there will always be, in the absence of an extraordinary coincidence, proportionally more of one "race" than another, or of one national origin than another, or of one religion than another, or of one sex than another. Indeed, *any* form of unjust discrimination will fall proportionally more heavily on some racial, national-origin, religious and sexual groups than on others (again, in the absence of an extraordinary coincidence). In the case of race, moreover, to determine whether or not members of one race are more heavily represented in the group suffering the unjust discrimination requires a definition of race which is nowhere provided by the 1964 Act or by the Court. (It is difficult to understand how the Court in *Griggs* knew that proportionally more "blacks" were unjustly denied employment by the test without a definition of "blacks" and "whites.") To read the Act as the Court did, however, does not really require a definition of race, since it can be assumed that any unjust discrimination will burden persons of one national origin, religion, or sex more than another; and the logical implication of the *Griggs* holding is that all unjust discrimination violates the Act, no matter what the motive of the discriminator or in which of the infinite possible manners his "test" is unjust. This reading of the Act renders meaningless its listing of specific types of unjust discrimination as *the* illegal ones and is palpably at odds with the intent of Congress, which was to focus only on certain forms of injustice. (See also discussion accompanying note 6 *supra*.)

40. See, for example, the Antioch College case, described at p. 255, *infra*.

ligion, national origin, or sex were objectively relevant to a decision affecting the protected benefits and freedoms. The Act does in fact provide an exception for cases where religion, sex, or national origin are "bona fide occupational qualification[s]." 42 U.S.C.A. § 2000e-2(e) (West 1970). Thus, for example, it would permit discrimination against males in casting for female theatrical roles. Although the express exceptions are limited to those listed above, the most reasonable interpretation of the Act, given the spirit of these express exceptions, is that whenever membership in a racial, color, religious, national, or sexual group is objectively relevant to any of the decisions to which the Act relates, an exception from the Act's operation will be implied. Consideration of one's color in hiring, for example, might not be proscribed if color is relevant (as in casting for the black role of Othello), even though only religion, sex, and national origin are explicitly mentioned; likewise, the exceptions probably extend beyond occupational decisions to, for instance, public accommodations practices, thus permitting separate restrooms for the sexes.⁴¹

The Civil Rights Act of 1964, read as a limited statement of the requirements of justice regarding group membership criteria in decision-making, would proscribe such practices as compulsory segregation or integration of houses and schools (*i.e.*, denying persons, because of their race, the freedom to live in a certain house or apartment or to attend a certain school), job quotas or preferences based on race, etc., and similar practices of distributing benefits on a preferential or proportional basis to racial, etc., groups as such. The 1964 Act, like the principle of justice, recognizes no distinction between benign and invidious discrimination, between integration quotas and segregation, or between "black-capitalism" loans and "blacks-only" restrooms. The Supreme Court's decision in *McDaniel v. Barresi*, 402 U.S. 39 (1971), holding that compulsory racial integration does not violate the Act, is based on its misinterpretation of the requirements of the Equal Protection clause, not on a different reading of the Act than that set forth above. (See discussion, pp. 248-49 *supra*.)

41. It should be noted, in the case of the casting for the role of Othello, that while the *color* of the actor is surely relevant to his suitability for the role, his race (ancestry) is not. Similarly, while it might be relevant to require that a teacher of Afro-American studies have knowledge of the plight of Afro-Americans derived from personal experience, if he has such knowledge then it should be of no consequence whether he is in fact an Afro-American. It is difficult, indeed, to think of situations in which race or national origin, as opposed to physical appearance, accent, mannerisms, knowledge, or personal experience, would be relevant to such kinds of decisions.

V. Conclusion

In the spring of 1969 the Federal government threatened Antioch College and other colleges with loss of Federal financial assistance if they maintained segregated "black" studies programs (*i.e.*, "black"-only enrollment and/or faculties) or segregated dormitories. The Health, Education, and Welfare Department contended that such segregation violated the 1964 Civil Rights Act. According to the newspaper report, the "black" students at Antioch responded that if the Act were supposed to benefit "blacks," then it would be a cruel joke if it were used to destroy the movement which they considered to be of the most benefit to them. The "black" students at Antioch were mistaken in their interpretation of the 1964 Act in the two most fundamental ways. First, as has been shown, the Act by its language confers its benefits upon individuals, not groups. Second, again as has been shown, the segregation and discrimination to which it was directed were not deemed evils because they were perpetrated by "whites"; they were bad *in principle*, regardless of who desired them, so long as they were not mutually voluntary.

The recent years have also witnessed a demand that "whites" as a race pay reparations to "blacks" as a race for past injustices, without regard to whether the "blacks" who will receive the reparations are poor or rich, ignorant or educated, the descendants of free men or of slaves, exploited or exploiters, damaged greatly or nominally, and without regard to whether the "whites" who will pay are rich or poor, descendants of slave-owners or of abolitionists, ante bellum families or recent immigrants, bigoted or the victims of bigotry, and so forth. The demand for reparations is not a demand upon those unjustly enriched on behalf of those unjustly deprived, *i.e.*, a demand for justice among individuals. It is not even a demand for blood-money, for it is not limited in scope to the descendants of the guilty and their victims. The demand for reparations represents the condemnation of a race *qua* race on behalf of a race *qua* race, without respect to individual desert—it is, in other words, simply an expression of "black" racism (by definition unjustifiable).

There have been other recent examples of the injustices entailed in using irrelevant group membership criteria in conferring

benefits or in restricting freedom. A program of governmental loans to "black-owned" businesses (rather than to "poor-owned" businesses or to "poor-employing" or "poor-serving" businesses) resulted in a loan to a wealthy "black" baseball player merely because he was "black." A prestigious law school has accepted well-to-do applicants for admission with a projected grade average below the minimum required to pass, because those applicants were "black," and rejected poor and lower-middle class applicants with a projected scholastic standing of above average, because those applicants were not "black." A court in a major city ordered integration (rather than desegregation) of public housing. Demands have been made and implemented for racial and ethnic quotas in various industries, rather than for hiring based on aptitude or even individual need and without regard to irrelevant group membership. School children have been assigned to schools on the basis of their ancestry.

It has been the thesis of this article that consideration of group membership in decision-making, when such membership is objectively irrelevant to the purpose of the decision, constitutes a denial of justice, whether the decision is one allocating benefits or is one restricting the freedom of those receiving equal benefits, even if the phenomena of discrimination, unjust disadvantage, and bigotry are taken into account.

Preferences to members of a particular group when such group membership is objectively irrelevant to entitlement is by definition unjust: many of those who will be benefited will be objectively less entitled to such benefits than will members of excluded groups.

Quotas designed to attain group equality are, as has been shown, really disguised preferences to individuals based on objectively irrelevant criteria. A quota system under which, for example, "blacks" received only ten per cent (their proportion in the population at large) of poverty funds would unjustly benefit the "white" poor, since more than ten per cent of the poor are "black." The only respect in which quotas are different from overt preferences is that over time, as the percentage of objectively entitled persons in each group changes, quotas designed to give preferences to objectively less entitled members of one group may end up giving preferences to objectively less entitled members of other groups.

Laws compelling segregation and integration based on irrelevant group membership are unjustifiable denials of liberty and

property, even if on the face of the laws there is equality of benefits and regardless of which group desires such policies.

Racial and ethnic groups cannot be defined in any way relevant to legitimate policies without eliminating their central element of ancestry. The definitions implicit, therefore, in the use of racial and ethnic criteria in decision-making either will be arbitrary or else will not be racial and ethnic ones.

There are not even any nonracial and nonethnic classifications, relevant to legitimate policies, membership in which classifications could be conclusively or sufficiently established by evidence of ancestry.

Decisions based on racial or ethnic criteria should be deemed illegal where there is state action or where the 1964 Civil Rights Act is applicable.

There was a time in the not far distant past when unprejudiced persons knew that the use of racial and ethnic criteria in decision-making was evil not solely because it was directed against the "black" man but because it violated the fundamental liberal-democratic principle that no person's entitlement or right to liberty and property should be based on objectively irrelevant criteria, such as his ancestry. Preferences, group-equality quotas, compulsory segregation, and compulsory integration were all seen as obnoxious. The prevailing ethic was that expressed by Mr. Justice Harlan in his dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896):

In respect of civil rights, common to all citizens, the Constitution . . . does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. [163 U.S. at 554.] . . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. [163 U.S. at 559.]

The "color-blind" or "ancestry-blind" principle is not one merely of justice; it is one of rationality.

There is a great deal of irony in the fact that the color-blind principle espoused in this article is today labelled as "racist" in some quarters. The irony consists not only in the fact that the

principle denies the definability and relevance of racial and ethnic groups, but also in the fact that no legitimate goal need be thwarted by the principle. Thus, the principle is quite consistent with the passage of antidiscrimination laws, with compensation for past governmental discriminations and other inequalities of benefits provided by governments, with aid to the poor and to the educationally disadvantaged. Indeed, the principle is consistent with a wide range of political ideology, from total socialism to complete laissez faire. In fact, the only political ideology with which the principle is not consistent is one of reaction—the political ideology, found in all of mankind's past, under which one's ancestry (high caste or low caste, noble or serf, "black" or "white," patrician or plebeian) is almost completely determinative of one's status.

The greatest irony in the condemnation of the "ancestry-blind" principle as "racist," in fact, lies in the racism of those making the condemnation. It is they who ask their officials to act on irrational and indefinable standards. It is they who clothe the naked racism of preferential standards, quotas, segregation, and integration in the Emperor's New Clothes of justice for the disadvantaged or the victims of discrimination. We do indeed have an obligation to aid the unjustly disadvantaged and to oppose prejudice and discrimination, but we have an equal obligation to do so without resorting to the use of irrelevant group membership criteria such as race.⁴² The moral and legal bases for our attacks on disadvantage and discrimination are the same principles of liberty and justice (embodied in the Constitution as due process and equal protection) which require that we not take irrelevant group membership into consideration. There could be no greater catastrophe for this nation than abandonment of these principles of individual equality for the spurious justice of equality among arbitrarily chosen groups.

POSTSCRIPT ON RACISM

It has often been remarked that we live in a "racist" society

42. There are many who, although recognizing that distribution of benefits to disadvantaged "blacks" only rather than to the disadvantaged as such is "not really perfect justice," attempt to justify such programs as "steps in the right direction." It is assumed that most of these people believe that welfare payments to poor families should be increased. Would they accede to a program increasing the payments to poor "white" families only as "a step in the right direction"? Even if the resources available are insufficient to cover all persons objectively entitled to the fullest extent of their entitlement, nevertheless they must be allocated on the basis of *relative individual* entitlement.

today. Though overdrawn, to be sure, this characterization is in part correct—but not only in the sense usually meant. Racism is manifested in many forms, including not only that most commonly referred to, *i.e.*, overt discrimination and prejudice against certain races (practiced, conventionally, by “whites” against “blacks” and other “nonwhites”), but also the prevalent though clandestine form known as “benign” discrimination, which carries two racist-tipped prongs—overt discrimination (practiced, conventionally, by members of all races, including some “whites,” against “whites”) and disguised prejudice (the paternalism and condescension behind the belief, articulated or not, that the “beneficiaries” of the “benign” discrimination should be judged by different—always lower—standards because of their race). Fundamental to and transcending these and other *forms* of racism, however, is the racist framework of perception, seen in the tendency of many persons, both “nonwhite” and “white,” to view in racial terms issues which have no rational relation to race. In this framework of perception a “white” person with whom a “black” man disagrees may be labeled a “racist.” Truths are not objective: they are racial. Capitalism is deemed “racist,” apparently because many “black” people do not believe they can operate successfully within it. American institutions and American history are deemed “racist” because the men who conceived and dominated them were primarily “white” men. Western civilization is deemed “racist” because it is the product mainly of “white” men. Any program or point of view proposed or held by “white” men which is opposed by “black” men is deemed “racist,” as is any rejection of or opposition to the demands or actions of any “black” person.

The idea that the color of one’s skin or his ancestry determines the validity of his statements and the value of his acts and principles is, of course, absurd. The use of the term “racist” to describe people with whom one disagrees, however, is more than semantic nonsense, more than elementary illogic: for it is precisely the one who views the world, including the world of ideas and values, only in racial terms who is the racist.

This view of the world is racist in even more than a literal sense, indeed: such inverted uses of the word “racist” to discredit an idea, a value, or a person are also degrading to the individuals

claimed to be the victims of the racism and thus reflective of the user's own attitudes towards those individuals. Implicit in his use (or, rather, misuse) of the epithets "racist" or "racism" in order to make *ad hominem* repudiations and justifications is the idea that the purported victims are objectively inferior to those of the opposite race. Whatever the standards being debated—whether they are standards of moral and just behavior, standards for admission to schools and for measuring achievement there, standards of skill required for jobs and professions, standards of language and art, standards of economic entitlement, standards required for democracy and freedom—the rejection of those standards, not on objective grounds, but on the grounds that they are "racist" (when in fact they are framed without reference to racial considerations), suggests a fear by their opponent that the purported victims (e.g., "blacks") cannot compete successfully or achieve all that they might desire under those standards, i.e., that objectively they are inferior. Such an attitude toward these "victims" is the ultimate abasement of them, the relegation of them from the status of the adult human being to the level of the child, the irresponsible, the subhuman. A person who, because of his race, can never be wrong can never be right. A person who, because of his race, can never be immoral can never be moral. A person whose "truths" are determined by his race can never discover and never know objective truth.

The degrading implications of the true racist's views are the product of his initial choice to look at the world in racial terms. If the distribution of a certain value is objectively good or just, then one should not worry that some members of a given race do not get all that they desire, for by definition it is good and just that they do not. If an idea is objectively correct, then one should not worry that some people of a certain race disagree with it or did not originally conceive of it, for their disagreement and the race of its originator cannot affect its truth. It is only by initially taking the racist's view of the world and focusing upon the race of the beneficiaries, advocates, or conceivers of a system, policy or idea that one is led to the fallacious conclusion that what appears as objectively just is really discriminatory. Even if, for example, the result of adhering to an objectively just program was that every "white" received more income than every "black," one should not be concerned, nor should one be concerned with the reverse; by definition the results would be just. If it is unjust for a "black" man to receive a low income, it is unjust because he is a man, not because he is "black." (This point has been discussed previously in dealing with the question of racial

or ethnic group representation. [See discussion accompanying notes 4-6 and p. 236 *supra*.])

Most persons do not maintain so degrading a view of "black" and "brown" persons today as do many "black" and "brown" leaders and many of their "white" supporters. Most "black" and "brown" persons want what is just for everyone, not merely what helps "black" and "brown" people *per se*. Most "black" and "brown" people wish to be credited with the same justness, disinterestedness, and lack of racism that "whites" are asked to have. Most "black" and "brown" people identify with the interests and values of people in general, for most "black" and "brown" people wish to be thought of as people, not only or primarily as "black" and "brown" people. Although it is *understandable* why many "blacks" and "browns" would at this point in history, after so many years of "white" racism, become racists themselves, assuming a racially oriented outlook and taking interest only in the advantage of their race rather than in justice, it cannot be said that so becoming racists is *justifiable*. To condone such attitudes would be to engage in the most pernicious form of racism: the paternalism, condescension, and degradation of holding "blacks" and "browns" to standards lower than those to which "whites" are held and thereby vindicating the very concept of "white" superiority that led to suppression of "blacks" and "browns" in the first place.

Recently, some scholars have come forth with what they believe is evidence that "blacks" as a group have a lower average intelligence than "whites" as a group. These persons have been viciously denounced as "racists" and even in some instances forbidden the opportunity to present their views. In truth, these studies *are* "racist" in their orientation—not because they show "blacks" to be intellectually inferior as a group, but for two reasons entirely independent from the nature of their conclusions: first, the choice of the groups compared ("black" race and "white" race) is arbitrary, as are the definitions of the groups; second, whether one group is *on the average* intellectually superior to another is irrelevant if *our only legitimate concern in decision-making is with the intellect of the individual*, who might be brighter or duller than the average of the group to which he has been arbitrarily assigned. Ironically, many critics of the

racist studies have adopted a racist viewpoint themselves in that they, too, have accepted as valid the arbitrary division into groups for purposes of comparing the average intellect of the groups. They dispute only the conclusions reached. Yet having accepted the assumption behind the studies that arbitrarily defined ancestral groups are somehow relevant groups for purposes of comparison (and presumably for purposes of decision-making), these critics of the studies run the danger, not encountered by those who reject the relevance of ancestry and ancestral-group equality in favor of individual equality, that their group will in fact suffer by comparison.

The dangers in comparison of irrelevant ancestral groups also confront those who have responded to the irrationality of "white" racial superiority with the irrationality of "black" pride, manifested in the pointless, racist search for "black" heroes and "black" cultures with which to identify and to offer as proof of ancestral equality, if not superiority. It is one thing for "blacks" or others to reject any imputation of inferiority because of the accomplishments of their ancestors when such rejection is made on the ground that one's ancestry should not be the basis for judging the individual. It is quite another thing to reject such an imputation merely on the ground that his ancestors were just as intelligent and virtuous as anyone else's. Unlike a snakebite, irrationality (here, "racism") cannot be fought with an extract from the poison itself, regardless of whether the poison is the irrationality of decision-making based on the superiority of one's ancestors or the irrationality of decision-making based on their equality. When the treatment of *individuals* is at stake, comparing their ancestors is irrational and dangerous.

It is ironic that, at the moment in history when willingness to treat persons on the basis of individual merit and desert, not on the basis of ancestry, is rapidly becoming accepted by most persons, there is a drive from the direction of those who suffered most from the irrationality of ancestral determination of status to resurrect ancestry as a valid basis of decision-making. Perhaps such a drive stems from a genuine but misguided attempt to accomplish legitimate goals. But part of the explanation must be that standing on one's own, as an individual, without being able to hide behind the virtues (and sometimes vices) of one's ancestors, is a frightening experience, as many "white" racists must have realized, consciously or subconsciously. The urge to identify with a group and have the virtues of its members attributed vicariously to oneself is a strong temptation, especially when one

foresees the possibility of his failure as an individual in terms of character, status, or other reward. However, such an escape into one's ancestry from one's individual worth and responsibility is ultimately an impossible act of bad faith, and one which no liberal democracy should encourage. Any consideration of racial or other ancestral group membership whenever it is irrelevant to individual worth, aptitude, entitlement or freedom, whether done for the purpose of discrimination against members of one group and thus preferring members of another, or for the purpose of attaining group equality, is antithetical to individualism, that ethos which regards the individual as primary to the group in reality and worth and which requires that he, not his group, be the source of entitlement and the recipient of justice. Individualism must continue to be the standard for decision-makers, for justice to the individual is the only true form of justice.